



Ministry  
of Justice

# **Litigants in person in private family law cases**

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# 1. Introduction to the Report

The Legal Aid, Sentencing and Punishment of Offenders Act (LASPO) 2012 removed most private family cases from the scope of legal aid after April 2013. It was anticipated that the volume and proportion of litigants in person would increase as a result. This report presents findings from a study commissioned by the Ministry of Justice (MoJ) to provide evidence of the experiences and support needs of litigants in person in private family law cases. Litigants in person (hereafter LIPs) define those litigants who represent themselves in court and include a range of litigants who may have received advice or representation at some point in their case. This study focuses on the experience of LIPs prior to the legal aid reforms in April 2013. It was designed to inform policy and practice responses to LIPs following the legal aid changes.

## The context

Litigants in person have long been a focus of policy concern in many jurisdictions. Lord Woolf (1995: ch 17, para 2) warned against regarding them “as a problem for judges and for the court system rather than the person for whom the system of civil justice exists”, remarking that the “true problem is the court system and its procedures which are still too often inaccessible and incomprehensible to ordinary people”. Despite judicial and policy interest, however, the research base on LIPs is modest.

Government-funded work includes Moorhead and Sefton’s (2005) research on family and civil courts and the Ministry of Justice’s relatively recent literature review (Williams, 2011). The MoJ review suggested: that there are “a number of gaps in our understanding of this issue”; that “unrepresented litigants in family and civil cases were common” but often “inactive, particularly in civil cases” (less so in family cases); and that LIPs might face problems “understanding evidential requirements, identifying legally relevant facts and dealing with forms” and coping with oral procedures (Williams, 2011:1). Court staff, the judiciary and lawyers “felt compensating for these difficulties created extra work and possibly presented ethical challenges” (2011:1). The MoJ review suggested evidence on case duration was mixed (partly because cases where LIPs did not participate tended to end quickly). Similarly, “the evidence indicated that lack of representation negatively affected case outcomes, although few of the studies reviewed controlled fully for case complexity” (2011:1). Internationally, Macfarlane’s large, interview-based study in Canada, for example, emphasised problems caused by complex court processes and court guides, confusing online resources which did not meet LIP needs, and “negative experiences with judges” (Macfarlane, 2013:13).

The introduction of legal aid cuts under LASPO 2012 for private family law proceedings, in which LIPs were already common,<sup>1</sup> brought LIPs under the spotlight again. The Green Paper that preceded the reforms predicted “an increase in the number of litigants representing themselves in court in civil and family proceedings” with the potential for “delays in proceedings, poorer outcomes for litigants ...implications for the judiciary, and costs for Her Majesty’s Courts Service” (Ministry of Justice, 2010:4.226). But it emphasised the paucity of “substantive evidence on the impact that a litigant-in-person has on the conduct and outcome of proceedings” (2010:4.268). It was hoped that LIPs might be able to resolve their family problems satisfactorily without recourse to litigation. To that end, legal aid funding remains for family mediation (2010:4.29).

LASPO was criticised by a wide range of interested parties, including the judiciary. It remains to be seen whether the reforms will lead to a sustained increase in litigants in person. The Family Justice Review Final Report expressed concern about anticipated increases in LIPs, expecting procedural reforms to “improve the situation mainly by helping more people to stay out of court, but they are by no means a full answer” (Norgrove, 2010:4.180; 4.183). In mid 2014 the evidence about the possible long-term trends remained unclear. The number of private law applications had dropped somewhat after an initial post-LASPO spike.<sup>2</sup> However, there were no early signs of significant diversion to mediation. In fact, in the first year the uptake of publicly-funded mediation fell significantly, suggesting that the withdrawal of legal aid had had a negative impact on the main referral route into mediation from family solicitors.<sup>3</sup> In the meantime, the proportion of represented parties at court had fallen significantly. In the first quarter of 2011 both parties were represented in 50% of private law children cases but that had halved to 26% in the first quarter of 2014.<sup>4</sup>

This research took place against the background of this rapidly developing policy context. It provides baseline data about the experience of LIPs and legally aided parties before the legal aid reforms effected by LASPO, in order to inform post-LASPO policy and practice developments.

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<sup>1</sup> Moorhead and Sefton (2005:26): 31.2% of ancillary relief cases and 48.5% of children Act cases in their sample included at least one litigant in person.

<sup>2</sup> The number of disposals dropped from 23,261 private law children matters in Q1 2011 to 21,246 in Q1 2014 (Ministry of Justice, 2014). A significant drop in the applications received by Cafcass in mid 2014 suggest that the number of court applications may continue to fall, at least in the short-term. See Cafcass Private Law Demand, June 2014 Statistics from Cafcass <http://www.cafcass.gov.uk/news/2014/july/june-2014-private-law-demand-statistics.aspx>

<sup>3</sup> Report of the Family Mediation Task Force, June 2014. <http://www.justice.gov.uk/downloads/family-mediation-task-force-report.pdf>

<sup>4</sup> Court Statistics Quarterly, January to March 2014, table 2.4.



## The study: aims and methods

The study was designed to develop understanding of the range of litigants in person in private family law cases, their behavioural drivers and support needs, and their impact on the court system. The research was designed as a primarily qualitative study focusing on understanding the range of experiences and perspectives, rather than a quantitative study seeking to measure variables.

The research included three linked studies:<sup>5</sup>

- *Intensive Cases Study (ICS)*. The largest element of the research involved detailed analysis of a sample of 151 cases heard in five courts over a three to four week data collection time frame in each court between January and March 2013. The approach was multi-perspectival, involving observation of the hearing in each case, interviews with the parties and professionals associated with the observed case (subject to consent and availability) and scrutiny of the court file.
- *Local Contextual Study (LCS)*. This involved a series of focus groups in each of the five courts with local stakeholders (judges, lawyers, Cafcass and court staff), interviews and observations with local LIP support organisations and observations of public areas such as court counters and waiting rooms.
- *Secondary Analysis Study (SAS)*. This involved secondary analysis relating to LIPs of two large national datasets from two current studies led by members of the research team (see Appendices C and D for detail of these two studies).

The three complementary studies were intended to provide the most robust means of addressing the specified research questions within the three month period available for fieldwork. The Intensive Cases Study was designed to ground the analysis in a detailed understanding of what had occurred in individual cases. The Local Contextual Study took a broader and longer-term perspective on court processes and stakeholder perspectives and experiences that might be overlooked in a case-specific analysis. The secondary analysis of the two additional large datasets was designed specifically to provide further material within which to contextualise the research data gained from the five local courts included in the ICS and LCS.

### The Intensive Cases Study (Observation Sample)

The largest element of the research involved a detailed analysis of a sample of 151 cases heard in five courts between January-March 2013.<sup>6</sup> It is important to note that the cases were

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<sup>5</sup> See Appendix A for a detailed description of the research methodology.

not selected randomly and the sample was not intended to be statistically representative, but was instead a purposive sample designed to reflect the full range of experience, including different case types, mix of representation, levels of participation in the case, characteristics of LIPs and court type. Each court was visited by two members of the research team, who selected cases to observe from among those scheduled for hearing during the observation period, in order to ensure a reasonable mix of representation types, matter types and hearing types, within a total target of 30 cases per court.

The resulting sample of 151 observed hearings included the following configurations of represented parties and litigants in person:<sup>7</sup>

**Table 1.1 Observed cases by representation type**

<b>Representation</b>	<b>Number</b>	<b>Percentage</b>
Fully represented	37	25%
Semi-represented*	75	50%
Neither represented	34	23%
Ex parte represented	1	1%
Ex parte in person	4	3%
<b>Total</b>	<b>151</b>	<b>102%</b>

\*includes 3 cases in which the unrepresented party or parties were intervenors (A001, D008, D029). Percentages may add up to more than 100 due to rounding.

In order to capture the full range of experience it was necessary to include more cases involving LIPs than were represented at that time within the court population. Quotas were set to ensure range and diversity across the types of cases – in particular those with two LIPs.<sup>8</sup> To put the sample into context, Moorhead and Sefton (2005:25-26) found 48% of their family cases sample involved at least one litigant in person, while it was relatively uncommon for both parties to be in person (less than 10% of their sample).

<sup>6</sup> See Appendix A for further details of the ICS and sampling approach.  
<sup>7</sup> Table A.2 in Appendix A sets out the characteristics of each of the 151 cases.  
<sup>8</sup> Since the focus of the study was on litigants in person, fully represented cases were only observed for purposes of comparison. By contrast, if 150 cases had been randomly selected for observation, the resulting sample would have included more fully represented cases and fewer cases with two LIPs.

**Table 1.2 Observed cases by court and matter type**

<b>Representation</b>	<b>CC</b>	<b>FPC</b>	<b>Children</b>	<b>Financial</b>
Fully represented	22 (21%)	15 (33%)	29 (28%)	8 (20%)
Semi-represented*	61 (58%)	15 (33%)	48 (46%)	26 (63%)
Neither represented^	22 (21%)	16 (35%)	28 (27%)	7 (17%)
<b>Total</b>	<b>105</b>	<b>46</b>	<b>105</b>	<b>41</b>

\* Includes one ex parte represented case.

^ Includes four ex parte in person cases.

Percentages may add up to more than one hundred due to rounding.

As can be seen in Table 1.2, around two thirds of the observed hearings were in County Courts and one third in Family Proceedings Courts. County Court cases were slightly more likely to involve one party in person, while FPC cases were more likely to involve both parties in person. Similarly, around two thirds of the observed hearings were in Children Act cases and one quarter were in Financial Remedy cases (the remaining five cases concerned Special Guardianship, Non-Molestation Orders or Divorce). Children Act cases were distributed in a similar way to the overall pattern, whereas financial remedy cases were more likely to involve only one party in person rather than both.

Again to put the sample in context, in the first quarter of 2013, in private law Children Act cases disposed of nationally, 42% had one party unrepresented and 11% had both parties unrepresented (MoJ, 2014:Table 2.4). Moorhead and Sefton (2005:25) found that while around half of Children Act cases included an unrepresented party, only around one third of financial remedy cases did so.<sup>9</sup> They also observed variation between courts in levels of self-representation (2005: 27; see also Hunter et al. 2002:25-26). Although the purposive sampling method was not designed to capture any such variation, the qualitative data from the Local Contextual Study does suggest variation in experience between courts according to the relative proportions of those working or in receipt of benefits in the local area. Individuals in receipt of benefits were more likely to be eligible for legal aid while workers with incomes over the legal aid threshold were more likely to be litigants in person.

Table 1.3 shows the distribution of cases by hearing type and representation status. The sampling sought to observe different types of hearing broadly in proportion to the distribution

<sup>9</sup> See also the financial settlements study recorded in Appendix C below, which similarly found around one third of contested financial order cases included a LIP.

by representation status. There were several exceptions to this. First, ‘approval’ hearings are not generally used in full representation cases as the assumption is that the parties will have received adequate legal advice. Second, the research team encountered relatively few cases where a Financial Dispute Resolution (FDR) hearing was held in a LIP case, and none at all in a non-represented case. This may reflect a general perception amongst the judiciary and lawyers that this type of hearing, predicated upon negotiation and settlement, is less likely to be effective without legal representatives. The team also under-sampled final hearings in full representation cases to concentrate resources on LIP final hearings. The researchers considered that the combination of the four ‘other contested’ and the single final hearing gave sufficient insight into contested hearings in full representation cases, combined with the existing literature and their general knowledge of the conduct of adversarial final hearings in family law cases.

**Table 1.3 Observed cases by hearing and representation type**

Representation	First	Directions	Review	FDR	Approval	Other contested**	Final	Total
Fully represented	9 (23%)	14 (27%)	3 (21%)	6 (60%)	0 (0%)	4 (67%)	1 (4%)	37 (25%)
Semi-represented*	20 (51%)	24 (46%)	7 (50%)	4 (40%)	2 (67%)	2 (33%)	17 (63%)	76 (50%)
Neither represented^	10 (26%)	14 (27%)	4 (29%)	0 (0%)	1 (33%)	0 (0%)	9 (33%)	38 (25%)
<b>Total</b>	<b>39</b>	<b>52</b>	<b>14</b>	<b>10</b>	<b>3</b>	<b>6</b>	<b>27</b>	<b>151</b>

\* Includes one ex parte represented case.

^ Includes four ex parte in person cases.

\*\* Includes interim hearings, fact finding hearings and maintenance pending suit.

In broad terms the preponderance of first and directions hearings in the sample reflects the balance of the workload in the family courts where relatively few private law cases proceed to a contested hearing, particularly a contested final hearing. Hunt and Macleod’s large, court-file based analysis of contact cases found that only 30% of their sample had any type of contested hearing and only 11% of the total sample reached a contested final hearing (2008: 167). A similar pattern was evident in financial cases. According to the Judicial Statistics for the first quarter of 2013, only 9% of financial remedy cases were adjudicated (MoJ, 2014 Table 2.6). Hitchings, Miles and Woodward’s analysis of financial settlements provides further evidence that few financial remedy cases have multiple hearings. In their sample of 114 cases that reached court, 69% had only one or two hearings (2013:63-4 and see Appendix C of this report).

For each of the 151 cases in the Intensive Cases Study the research team sought to obtain multiple perspectives on the needs and experiences of LIPs and their impact on other parties, professionals and the court system as a whole. The researchers did this by triangulating data sources as far as possible, subject to consent and logistics. In each case one or more of the research team observed the hearing including, where possible, observation of the interactions between the parties and any lawyers involved before the hearing. The research team also analysed the court file for each case to understand the issues being litigated, the trajectory of the case and to access any independent reports, e.g. the safeguarding report prepared by Cafcass in children cases.<sup>10</sup>

The research team also attempted to interview the parties, professionals and supporters involved in each of the 114 LIP cases to get their perspective on the process and outcome.<sup>11</sup> In total 117 interviews were conducted with parties from the 114 LIP cases, with at least one adult party interviewed in 82% of LIP cases.<sup>12</sup> The 117 party interviews included 97 LIPs (39 applicants, 54 respondents and 4 intervenors) and 20 represented parties. The professional and supporter interviews included 33 judges, 38 lawyers, 4 other professionals and 10 McKenzie Friends.

Taken together, in 90% of the LIP cases the research team observed the hearing, scrutinised the court file and conducted at least one interview with a party or professional. For details of each individual case observed, see Appendix A, Table A.2.

### **Local Contextual Study**

In addition to the 151 individual cases selected for the Intensive Cases Study, the research included separate focus groups with Judges, Lawyers, Court Staff and Cafcass in each of the five courts. Over a hundred family justice professionals contributed to these focus groups, including 21 judges, 33 lawyers, 31 court staff and 26 Cafcass officers and managers.<sup>13</sup>

The research team also observed the common areas (entrances, waiting rooms etc) in each court. In two courts there was a LIP support office (the Personal Support Unit) and the researchers observed their operations and conducted interviews with their staff. The purpose of this additional data collection was to provide a broader context for interpreting the findings

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<sup>10</sup> Details about the data collection instruments used in the study can be found in Appendix A, Section A2.

<sup>11</sup> See Appendix A for details of the sampling approach and a breakdown of data sources by case.

<sup>12</sup> A further three interviews were conducted with parties (1 applicant, 2 respondents) in three full representation cases.

<sup>13</sup> See Table A.3 in Appendix A for further detail of the focus groups participants.

relating to individual cases and to identify wider themes and issues that might be missed by focusing on individual cases.

### **Secondary Analysis Studies**

A further dimension to the analysis involved secondary analysis of data relating to LIPs from two national studies led by members of the research team. The first was a study of financial settlements on divorce funded by the Nuffield Foundation. The data for this study was collected from 399 court files, from four courts in different regions, in which final orders in the financial case were made in two periods between 2010-2012. The project dealt with closed cases and was thus able to provide an overview of each case in its entirety, including matters dealt with almost entirely on paper by judicial box work, rather than through hearings. A full account of the methodology of this study is provided in Appendix C.

The second study involving secondary analysis was drawn from the Mapping Paths to Family Justice project funded by ESRC. This study investigated awareness and experiences of three forms of out-of-court family dispute resolution: solicitor negotiations, mediation and collaborative law. The methods used included qualitative interviews with 96 parties who had used at one of these forms of dispute resolution since 1996. The secondary analysis reported here concerned eight interviews where one or both of the parties had both attended out-of-court dispute resolution and had also been involved in court proceedings as a litigant in person. The methodology for this study is reported fully in Appendix D.

The purpose of the secondary analysis was to place the sample into a wider national context.

### **Access and ethics**

Approval for the study was obtained from Exeter University Ethics Committee, the government Data Access Panel, the President of the Family Division, Cafcass Research Governance Committee and the Ministry of Justice.

### **Approach to analysis**

The data collection resulted in a large and complex data set comprising quantitative, quantifiable and wholly qualitative data from multiple sources and perspectives.

The quantitative/quantifiable data derived from the hearing observation and case files and from the financial settlements study was analysed using descriptive and bivariate statistics.

The bulk of the data was in the form of qualitative fieldwork notes and interview and focus group data. The approach to the qualitative analysis varied to some degree depending upon the research question being addressed. The profiling of the characteristics of LIPs (Chapter 2) was driven by a structured approach to code and classify qualitative data, referring to and developing from categories found in the existing literature on litigants in person. In contrast, the material on the support needs and experiences of LIPs (Chapter 5) and the pre-court (Chapter 3) and in the hearing (Chapter 4) sections was analysed by using an inductive thematic approach. A typology of working and not working hearings (Section 4.4) was generated inductively using a constant comparative method.

### Reflections on the research design

It should be stressed that the study is primarily a qualitative study with a purposive sample designed specifically to explore the range of experiences. The observation sample was broadly based in line with the sampling criteria (see Appendix A.1 for further detail). It is important to note that it was not a 'convenience' sample based in a single court or provided by a small number of judges, which might tend to produce a more homogenous sample; nor was it reliant upon groups of lawyers or litigants, possibly with extreme or atypical views, self-selecting into the sample and therefore introducing significant bias. Given the broadly-based nature of the sample, therefore, in places the report includes some indication of the comparative weighting of various groups within the sample. For example in Section 5.4 below the report notes that most LIPs in the sample did not proactively seek information and advice prior to the hearing and in Section 2.3 it observes that most LIPs in the sample were not self-representing by choice. These references to the varying proportions of groups are included to help understand the nature of the sample as context for the qualitative findings. They also give some *broad* indication of the relative (but not absolute) sizes of the various groupings that might feature in the wider court population. Such indications would, of course, need to be tested with a larger representative sample.

Overall the research team are confident that they achieved a sufficiently large sample of observed cases that broadly reflected the workload of the family courts before the introduction of the legal aid reforms in April 2013. The combination of observations, case file analysis and interviews and focus groups with all the key stakeholders provided a rich, multi-layered data set on the range of LIPs, their behavioural drivers and support needs and their perceived impact on the court system pre-LASPO, as a means to inform policy and practice post-LASPO. In order to maximise the value of the data for informing future policy and practice, it was necessary to include some analysis of whether and how LIPs post-LASPO might differ from those observed pre-LASPO. Section 6.1 below therefore includes a detailed

profile of the legally-aided parties in the observation sample and consideration of whether those parties would remain eligible for public funding post-LASPO.<sup>14</sup>

### A note on terminology

Litigants who represent themselves at court are referred to in this report as litigants in person (LIPs). **'Partial representation'** refers to litigants who had legal assistance at some stage in the court process but not throughout. Cases where both parties were represented at court are termed **'fully represented'**. **Semi-represented** refers to cases where one party was represented, one was in person. **Non-represented** cases are those where neither party was represented.

The five fieldwork courts are referred to as Court A, Court B etc. to protect the anonymity of parties and professionals. Individual cases were given a combined court and case number identifier, e.g. Case A008 was the eighth case observed in Court A.

A glossary of legal and associated terms is appended to this report.

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<sup>14</sup> See also Table B.2 in Appendix B for a case-by-case profile of represented parties in the intensive cases sample.



## 2. Types of Litigants in Person

### 2.1 Introduction

This chapter maps the range of litigants in person in the sample and their behavioural drivers. It addresses the characteristics of the LIPs that were observed; their reasons for self-representation and how they perceived the absence of a lawyer affected their case; whether they had legal representation at any stage of their case; the experiences of different types of LIPs, including their capacity to meet the court's expectations, vulnerabilities and case complexity; the extent to which they participated or not in court proceedings and their reasons for doing so; and other ways in which LIPs may create problems for the court process.

#### Key messages

- The majority of LIPs in this sample were in person because they were ineligible for or had been unable to obtain legal aid, but could not afford legal representation. Only around one quarter were in person because they had wholly or partially chosen to be so.
- Around half of LIPs had had legal representation or advice at some stage during their case.
- Almost all LIPs had difficulties with court procedures and the legal issues involved in their case, and around half were personally vulnerable in some way, which made negotiation of the legal and procedural requirements of self-representation more difficult.
- LIPs appeared no more likely to bring unmeritorious or serial applications than represented parties.
- Problems created by LIPs included a refusal to engage with proceedings, and less commonly, aggressive and disruptive behaviour.

### 2.2 Characteristics of LIPs

A total of 165 litigants in person appeared in the observed cases. Consistent with previous quantitative studies (Moorhead and Sefton 2005:26; Hunter et al. 2002:23), the litigants in person the researchers observed were more likely to be respondents (107, including 6 intervenors) than applicants (58). This held true in both Children Act and financial remedy

cases, although the disparity was greater in financial (12 applicants; 30 respondents) than in children cases (44 applicants, 70 respondents).<sup>15</sup>

The sample contained similar numbers of male (86) and female (79) litigants in person. Male LIPs were almost as likely to be applicants (38) as respondents (48), but female LIPs were much more likely to be respondents (59) than applicants (20). These figures indicate that in this sample at least, men were more likely than women to choose to initiate court proceedings in person, while female LIPs were less likely to be in court by choice.

Previous quantitative research has found that litigants in person are more likely to be male, younger, in receipt of benefits, and to have lower incomes and educational levels than those with representation (Williams 2011:4). While the LIPs the researchers observed represented a range of income and educational levels, as a qualitative study the team did not seek to gather systematic demographic details and such information was not reliably available from the court files. Consequently, the researchers cannot provide comparable quantitative data on the overall age, income or educational distribution of the sample. The evidence on reasons for self-representation (below) would suggest that the litigants in person that were observed, on average, had lower incomes than those paying for legal representation. In the English context, however, people on welfare would have been likely to be in receipt of public funding for legal representation prior to 1 April 2013. As a general proposition, LIPs tended to occupy a socio-economic space between represented litigants who were privately funded and those who were legally aided.

### **2.3 Reasons for self-representation**

The literature and the interviews with judges, lawyers, court staff, Cafcass officers and support services suggest a wide variety of reasons why people might not have legal representation, and most of these reasons were reflected in the observation sample. These reasons can be divided into three broad categories: cost, choice (non-cost-related) and difficulties with legal aid resulting in lack of legal representation at the observed hearing. As shown below, some litigants gave mixed reasons for being in person, combining inability to afford to pay for representation with an element of choice. In a number of cases, there was insufficient evidence available – usually because the LIP did not appear at the hearing or

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<sup>15</sup> See also the findings from the financial settlements study in Appendix C: respondents more commonly appeared to be acting without lawyer support in divorce cases and more commonly acted in person in contested financial order cases.

was not interviewed – to assign them to one of these categories. Where there was clear evidence of the reason/s for self-representation, either from the file or an interview, approximately half of the LIPs were in person for reasons of cost alone. The other half were fairly evenly divided between choice alone, mixed reasons and practical difficulties with legal aid. A further small group appeared in person for other reasons (see Appendix B, Table B.1). If the ‘choice alone’ and ‘mixed’ categories are grouped together, around one quarter of LIPs had at least partially chosen to represent themselves, with around three quarters being unrepresented because they were unable to obtain legal aid and/or unable to pay for legal representation. It should be remembered that this was a purposive sample and so cannot be generalised beyond this study. That said, it is useful to have some indication of the rough distribution of reasons within the sample, not least to provide context for understanding the findings presented elsewhere in this report. It is worth noting that the breakdown of reasons given above is fairly consistent with that found in other studies of litigants in person, i.e. between 75 and 80% due to inability to pay and between 20 and 25% choice (see Dewar et al. 2000: 33; Macfarlane 2013:49).

In interviews, those appearing in person for reasons of cost and difficulties with legal aid generally said they did not wish to be in person, would have preferred to have a lawyer representing them and felt they would have done better with a lawyer. By contrast, as described below, those who were in person for reasons of choice did not think that having a lawyer would affect the outcome of their case.

## Cost

A major reason for self-representation offered both in the wider literature and by the focus group participants was an inability to afford the cost of legal representation (Moorhead and Sefton 2005:20-21; Dewar et al. 2000:33; Mather 2003:149; Williams 2011:4; Macfarlane 2013:39, 41). This also emerged as the major reason for self-representation given by the LIPs in the case sample.<sup>16</sup>

A large group found themselves over the eligibility threshold for legal aid but unable to afford a lawyer. For example:

- The respondent mother in B021 worked part-time, earning £124 per week. She was assessed for legal aid and was surprised to find that she was not financially eligible. Since she could not afford to pay for a lawyer she was representing herself.

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<sup>16</sup> See Table B1 in Appendix B for a summary of the reasons for self-representation for each litigant in person.

- When asked why he did not have a lawyer representing him, the applicant father in C020 replied: “It’s really expensive, it is so ... when you’ve got bills to pay and I’ve applied for legal aid and they said I just fell short of the threshold, but when you’ve got other bills to pay, the house to run, it just gets really expensive”.
- The respondent mother in C025 explained that “he left me with £30,000 of debt but because I was working I couldn’t get legal aid... I think I was probably a few hours [of paid employment per week] over the means tested benchmark and I couldn’t get any help at all”.
- The respondent mother in E020 had seen a lawyer who thought she would be entitled to legal aid because of her low earnings, but when she applied for legal aid, she was found not to qualify because her child tax credit put her over the threshold.
- The respondent mother in E002 was a student and deemed ineligible for legal aid on the basis of her student loan. Likewise, the applicant father in E003 was ineligible on the basis of his own and his new partner’s student loans and his partner’s income from part-time work. But as he noted, “the case is regarding my daughter and contact with her and I spend about £4000 a year driving to see her so I can’t afford a solicitor and everything else as well and that doesn’t get counted in the assessment for the legal aid”.

This group who were self-representing on cost grounds included those who said they were unable to pay the assessed contribution to obtain public funding. For example:

- The respondent husband in E008 worked as a painter and decorator. He explained: “I was paying £45 a month towards the legal aid and I found I couldn’t pay that and I missed three payments, and until I paid the three payments I missed I could not have a solicitor present. So there was no way I could make up the money I had missed so I had no choice but to be there on my own”.
- According to the respondent mother in E009: “I was £5 over the threshold for some form of legal aid. It wouldn’t have paid for all of it, but ... I would have had to pay ... yeah, it was £5 over and they said to me that it would cost about £500 or something, and that’s not money I’ve got when I’m a student”.

In several other cases, litigants had been granted limited legal aid (legal help or family help higher) but this had not extended to cover legal representation at court or for final hearing (C018RM, C026AF, D016, D025).

A second substantial group had some capacity to pay privately for legal representation, but the limits of that capacity were manifested in their appearance in person at the observed hearing. Some had exhausted their funds in previous litigation so were now forced to appear in person. For example:

- The husband in B063 had spent £11,000 up to the financial dispute resolution appointment (FDR) in financial remedy proceedings and could not afford to pay for further representation.
- The father in D018 had “spent a fortune on lawyers” in children’s and financial proceedings, and had now run out of money so was forced to act in person in his application for enforcement of contact.

In focus groups, judges and court staff noted that enforcement and variation applications were often made in person because the litigant had exhausted their funds in the earlier proceedings (Judges A and D, Court Staff D.)

A number of other LIPs appeared in person in the observed hearing in order to conserve limited funds, while paying for legal assistance out of court. For example, the applicant wife in D014 had a solicitor in the background who was representing her for the divorce but providing unbundled services (see glossary) for the financial remedy proceedings. In fact, this solicitor had not only prepared the relevant forms but had sent the wife to court armed with a letter akin to written submissions. By contrast, in D024, the mother’s solicitor had advised her she could handle the First Hearing Dispute Resolution Appointment (FHDR) in her children’s matter alone to save costs, but things did not proceed according to plan and she was determined not to attend without a lawyer again.

A third sub-group within this category had made a cost-benefit calculation and decided they could not justify the cost of representation. For example:

- The mother in A017 considered that the cost of legal representation would be too much of a strain on the family budget and the money could be better spent for the benefit of her family, although she did not rule out getting a lawyer if the matter went to a final hearing.
- The husband in B060 had begun the financial remedy proceedings represented, but costs had escalated and threatened to consume all of the assets in dispute, so he was now in person.

## Choice

Those who had ‘chosen’ to appear in person also did so for a variety of reasons. One group felt that legal representation was unnecessary. This might be because the matter was essentially uncontested (e.g. in children’s cases where the respondent supported the application for residence, contact or special guardianship in a context in which a court order was needed), or because they perceived the case to be fairly straightforward and not calling for legal expertise (e.g. financial remedy cases with few assets or approval hearings).<sup>17</sup> The mother in A009, for example, said that she trusted Cafcass to make the right recommendation based on the children’s wishes, and trusted the judge to see the case as it was:

I just think you don’t need a solicitor to sit there when you know what’s fundamentally wrong and the court is listening. ... I don’t think a lawyer necessarily would have helped in this case because there wasn’t legal points to be made. It was about the children and how they feel.

A handful felt they could do just as well in court as a lawyer – “nobody knows the case better than me” (D010) – an opinion sometimes based on expressed dissatisfaction with the service received from previous legal representatives (see also Williams, 2011:4-5). Some LIPs were distrustful of lawyers altogether, viewing them as only interested in running up bills and representing a waste of money. In focus groups, some lawyers, judges and Cafcass officers referred to litigants in person who preferred not to take legal advice but represented themselves in order to be able to have their say and assert their position without constraint (Lawyers D and E, Cafcass D and E, Judges D), and there was certainly a flavour of this in some of the cases observed. For example, the applicant father in B051 who had a lengthy criminal history and acted in an aggressive fashion in court felt that he could do better for himself without a solicitor because, in his view, ‘solicitors never did what you asked them’, and he had sacked his for that reason. A further handful of respondents appeared to have chosen not to obtain legal representation as part of a general strategy of refusal to engage with the proceedings – a phenomenon explored further in section 2.6 below.

Finally, a small number of LIPs had taken a moral or principled position not to have a lawyer. The father in E012, for example, who was applying for enforcement of contact, said he had done nothing wrong and was not happy paying for a lawyer when it was not his fault. The mother in D017 had chosen not to have a lawyer when the father was also in person,

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<sup>17</sup> Also noted by Mather (2003: 150) and Williams (2011: 4).

because she thought it would look better to speak for herself and for the judge to see both of them as they were:

...do they look at me lower because I try to come here and speak for me and [child], instead of trying to hide behind someone? Like I just wanted to show them the genuine side of me instead of hiding behind someone...

### Difficulties with legal aid

The third group of litigants in person did not wish to be unrepresented, but attended the observed hearing without a lawyer because either they were still awaiting the outcome of their application for legal aid, or their legal aid had been withdrawn so close to the hearing date that they had had no opportunity to try to make alternative arrangements. Lawyers at Court D pointed out that the pace of decision-making by the Legal Services Commission<sup>18</sup> (LSC) did not match the court's timetable, so there was often no decision on legal aid by the time of the first hearing in children's cases.

In the court files, the researchers came across a number of letters requesting adjournment of the FHDRA because a party had not yet received a decision on their legal aid application. These requests were almost invariably refused on the basis that parties would have the assistance of Cafcass at the first hearing and hence there was no reason why they could not attend in person - a response which appears to have been unduly harsh in several cases. For example in C002, the court refused a request from the LIP father's solicitor to adjourn the first hearing for 21 days because the father had received no response to his legal aid application, but it later granted a request by the LIP mother to postpone a hearing because she had booked a holiday for that time. In C012, the LIP father was a highly confident serial applicant who was seeking a residence and relocation order in his favour and had made serious allegations about the mother's behaviour, yet a request by the mother's solicitor to adjourn a hearing while she awaited the outcome of her legal aid application was similarly refused.

Variations on the scenario of a LIP awaiting the outcome of a legal aid application included the litigant only recently becoming eligible for legal aid, receiving short notice of the first hearing where proceedings were initiated by an urgent ex parte application, having difficulty providing the necessary documentary evidence of eligibility for legal aid, or changing solicitors and having to make a fresh legal aid application.

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<sup>18</sup> The Legal Services Commission was replaced by the Legal Aid Agency in April 2013. For information about its remit see <http://www.justice.gov.uk/about/laa>

The recent withdrawal of legal aid might have been on the basis of means (the litigant's circumstances having changed), the need to apply for an extension having reached the cost limit of Family Help Higher (see glossary), or on the basis of merit, when expert reports were filed prior to final hearing which did not support the litigant's case. A lawyer<sup>19</sup> argued in interview that it was unhelpful for the LSC to withdraw legal aid in these circumstances, which inevitably resulted in the litigant appearing in person at the final hearing, whereas ongoing representation would enable them to receive sensible advice about their prospects and possibly reach a negotiated resolution.

### Mixed reasons

Dewar et al. suggest that “the reasons leading to the conclusion that a lawyer's services were not affordable may be complex and cumulative” (2000:36). Macfarlane also notes that litigants in person may rationalise their inability to afford a lawyer by reference to dissatisfaction with legal services previously received or a belief that they are best placed to handle their own matter (2013:44, 49). Around half of the LIPs in this study who expressed a choice-based reason for being in person fit this profile, giving reasons for self-representation that combined cost or difficulties with legal aid with an element of choice. For example:

- The father in A008 did not qualify for legal aid on income grounds but could not afford a solicitor. He reasoned, however, that he didn't want to bully the mother who was also in person, and that appearing in person would be more personal. “I thought if I represented myself, it was coming from me, I was able to express my thoughts and feelings”.
- The father in B050 had originally intended to have a solicitor but had difficulty engaging one. They wanted him to apply for legal aid but it was taking a long time so he decided to go to court anyway. He felt he could speak for himself and did not need a solicitor: “I've had a child..so obviously why should I take a solicitor for something which is God given, which is natural?”
- The father in A009 gave five reasons for not having a lawyer: “Firstly, cost. Secondly, it was a civil [i.e. amicable] affair. Thirdly, cost (laughs)”. He then added two further reasons: that the court paperwork was reasonably self-explanatory to an educated person and that a lawyer was irrelevant because the judge would follow what Cafcass “instructed” in any event.

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<sup>19</sup> Case number C021.



## Preference to be represented

Those who had chosen to appear in person regardless of financial considerations generally felt that they did not need a lawyer, while some of those who could not afford representation rationalised their appearance in person as just described above. However, the great majority of the LIPs interviewed who were self-represented for reasons of cost or difficulties with legal aid, expressed dissatisfaction with their situation and considered they would have been much better off with a lawyer. The father in B054, for example, was from a continental European country and said he had tried to find a lawyer in England but it was too expensive.

*Do you think there are any advantages to being on your own in the court environment?*

No... I think you're better off with a solicitor or lawyer.

*Why do you think you are better off with a solicitor or lawyer?*

Well they know what to say to the judge and I just speak from my heart or from... it doesn't always work I guess.

In C002, both parties were in person, but the respondent father felt that he had suffered for being less articulate than his ex-wife:

Well from what I know...you are definitely better off coming with a solicitor you know, it is tricky... I felt sometimes the judges were totally on my wife's side.

*Yeah...?*

But I think that is 'cos the case is against me...

*Because she is the applicant?*

She is the applicant and I felt they picked on me more in there and I weren't allowed to speak, sometimes it felt like in there. I think if I had a solicitor in there that wouldn't have happened. ... My wife can talk, she's got the gift of the gab anyway and I couldn't say anything. ... I am not the most talkative person so I think it's best to have a solicitor and I definitely would have been better off with a solicitor.

*Okay, so you do feel you have been a bit disadvantaged?*

Yeah, definitely.

The respondent husband in D025 had represented himself at the final hearing of financial proceedings and lost everything. He considered that he could have handled the earlier stages (first appointment and FDR) on his own, but was clearly regretting the fact that his legal aid had not extended to the final hearing:

I think if I was legally represented ... as my wife was ... it would have been a completely different outset. You know I found the judge at the final hearing incredibly fair, incredibly helpful. But the long and the short of it is I have failed because I didn't know the process, I didn't know the procedures in court, I didn't know what had to be done for court, I wasn't prepared for it. ...

*Yeah, yeah. Were there particular aspects which you think that you needed to know but you didn't?*

All of it. ... I went into that court absolutely blind – absolutely completely and utterly blind – didn't know what to expect, what to say, what I could say what I couldn't say, what to take with me ...

As a final example, the respondent mother in E018 pointed to three disadvantages of not having a lawyer. The first was that proceedings had been unnecessarily protracted due to both LIPs' misunderstanding of who should organise a DNA test. The second was her concern that she would not be able to represent herself effectively in the event that a DNA test had shown that her ex-husband was the father of the child. The third was her inability to pursue proceedings for a financial remedy:

*So this is the fourth hearing?*

Yeah this is the fourth time back. There has just been delays, that's all. The last time we came we both misunderstood what the judge was telling us. He told me to make [son] available for DNA testing but he said the same to [ex-husband] and we just both presumed that the court was going to organise a DNA test but it wasn't, it was [ex-husband] who had to do it. So we had to come back to be told that no, we had to do it. ... we didn't understand the system. ...

*Yeah, and if you had had a lawyer then probably it would have been a lot easier...?*

Yeah. ... So that was that, that was a wasted trip in (laughs).

*Anything else you think would be useful...?*

... Me and my ex husband haven't signed a... what are they called, I can't think the name of it... where the legal... financial agreement after a divorce, we haven't done that, he is still in the marital home ... I could go for the money but because I can't get legal advice there is no point me doing it because I probably wouldn't get anywhere with it. So I think it does make a difference in people's lives because legal advice is so expensive, you know, there is no way I could fund it on my own. If I wasn't so lucky in the fact that with the baby he's not actually his,

I could be in big trouble now. I could be expected to hand him over and there would be nothing I could do about it because I wouldn't know how to fight my corner. So yeah, I think it makes a big difference definitely.

*What's going to happen with the house and things?*

I am just going to have to let him keep it. And I am in rental with the children and he's in the house on his own but there is nothing I can do about it.

## Encouragement to self-represent

Lynn Mather has argued in the US context that self-representation is a product of institutional as well as individual reasons, i.e. that courts' simplification of procedures and provision of assistance encourages people to believe they can handle their family law cases themselves (2003:150). This was also observed in some of the Australian research (see Hunter et al. 2002). In the current study, none of the interviews with judges, practitioners, court staff or LIPs or local contextual observations suggested that court procedures had been modified or particular assistance provided so as to encourage parties to feel confident in representing themselves in private family law proceedings. Any future moves to better accommodate LIPs may, of course, have this effect.

## 2.4 Partial representation

The phenomenon of partial representation has been observed in several studies of litigants in person (Hunter et al. 2002; Mather 2003; Moorhead and Sefton 2005; Macfarlane 2013; see also findings relating to contested cases in the financial settlements study reported in Appendix C below). The analysis of court files indicated that almost half of the LIPs in the sample had evidence of legal assistance or representation at some stage during their current proceedings (not including one-off free legal advice sessions), and some also or alternatively had been represented in previous family law proceedings. There were similar levels of partial representation in Children Act and financial remedy proceedings<sup>20</sup> and between applicants and respondents.<sup>21</sup>

The literature has also observed different patterns of partial representation (Hunter et al. 2002:77-84; Mather 2003:143; Macfarlane 2013:29, 43; also reflected in the financial

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<sup>20</sup> Cf Moorhead and Sefton (2005: 28), who found a higher level of partial representation in Children Act than in financial remedy cases.

<sup>21</sup> Cf Hunter et al. (2002: 23), who found a higher level of partial representation among respondents than among applicants. See also financial settlements data for contested cases which proceeded to FDA or beyond, App C below.

settlements study data in Appendix C below). The major patterns among the litigants in person in descending order of frequency were

- (1) beginning with a lawyer and becoming unrepresented;
- (2) assistance from a solicitor out of court but self-representation in court; and
- (3) beginning in person but becoming represented.

These distributions should be treated with caution, however. Because the researchers were observing live rather than concluded cases, there was more opportunity to see patterns (1) and (2). Similarly, as ongoing cases the research team would not know whether litigants in person at the first hearings that had been observed would subsequently become represented (although as indicated above, a number were hoping for a favourable legal aid decision). Moorhead and Sefton concluded from their study that litigants were more likely to begin unrepresented while awaiting legal aid than to begin legally aided and subsequently lose it (2005:29-30). Likewise, while some lawyers and judges mentioned in interviews their experience of people who had been in person throughout their case briefing counsel for the final hearing, this occurred in only one of the observed cases. However, the team observed relatively few final hearings, and without knowing the history, such a case would have appeared on the day as 'fully represented' and thus of less interest to the study. In the financial settlements study reported at Appendix C, 41%<sup>22</sup> of those acting in person in cases that went to First Directions Appointment or beyond were in person throughout.

Of those who began with a lawyer and became unrepresented, around half had paid privately and half had had legal aid. The latter included those who had had Family Help Higher which was not extended, and those whose legal aid certificate had been terminated on means or merit grounds. The former included those who had run out of funds to pay for legal representation (especially in the context of long-running, highly contested proceedings), had decided to act in person because they did not feel their lawyer was providing value for money, had dispensed with their lawyer after receiving unpalatable advice, or had lost contact with their lawyer and ceased to give instructions.

The out of court/in court pattern mainly consisted of those paying privately for unbundled services, whereby their solicitor would provide advice and/or assistance with paperwork, but would not attend court to save money. In a few cases this assistance extended to occasional court appearances. A smaller group within this pattern received advice or assistance from a solicitor pending the outcome of their legal aid application, either pro bono, privately paid, or

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<sup>22</sup> 20 out of 48; a further 5 did not participate at all, or very nearly so. The remaining 23 who were in person at some stages displayed various patterns of partial representation.

on Legal Help. If the legal aid application was unsuccessful, however, this assistance would cease. Almost all of those in pattern (3) had been in person while awaiting the outcome of their legal aid application.

These different patterns of self-representation inevitably affected LIPs' expectations about the court process and their support needs. Those who had legal representation at the outset of their cases had the opportunity to gain initial legal advice and an expert assessment of the merits of their case, and to become somewhat familiar with the court process before appearing in person, whereas those who began unrepresented did not have the benefit of such initial advice and familiarisation. Those who had the support of a solicitor out of court had fewer difficulties in preparing paperwork, while still facing the challenge of in-court advocacy.

## 2.5 Competence and capacity to act in person

This section discusses the characteristics of litigants in person which make them more or less able to meet the expectations of court proceedings. The implications of this analysis are considered in Chapter 6 below. It should be noted at the outset that competence and capacity are relative rather than absolute terms, concerning the performance of particular tasks – in this case, the complex task of representing oneself in private family law proceedings, as they were structured at the time of the observations.<sup>23</sup> As one of the LIPs who was interviewed, an electrician by trade, eloquently put it:

If I walked into a meter room, I could take the systems apart with my eyes closed.

If I walked you in there you wouldn't know what you were doing.

*No I wouldn't, I'd want to give it to you.*

There you go, there you go.

*I'd want to give you the screwdriver. (laughs)*

Well I walk into that court absolutely blind and knowledgeable of what I was going in to do. ... You know we're not all lawyers. The judges are sitting in there, the lawyers are sitting in there and do this job every day and it's what they're trained to do. I'm just thrown in there with a blindfold on. (Respondent husband, D025)

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<sup>23</sup> Clearly, one possible response to these findings is to restructure court proceedings to make them more easily navigable by LIPs. This point is addressed in chapters 4 and 5 and in the recommendations.

### (Apparently) competent litigants in person

Some of the LIPs who were observed presented as articulate, calm, collected and confident and appeared to handle self-representation competently.<sup>24</sup> In the majority of these cases, however, scrutiny of the court files revealed that the litigants had not complied with the correct procedures for producing, filing and serving documents and the interviews with the other side revealed that the litigants were difficult to deal with out of court. Some had an exaggerated view of their own competence when in reality they were not able to meet what was required or expected of them. There appeared to be no clear relationship between being highly educated, professional and articulate and being able to handle family law proceedings effectively. For example:

- From the evidence on the file and observations in court, both LIPs in B052 were well-educated professionals who appeared able to conduct their cases reasonably well. But while they had filed their statements with the court, they had not served them on the other party, which resulted in the court adjourning the matter since neither party knew the case they were supposed to be answering.
- From the financial evidence on the file and observations in court, the husband and wife in B063 were both intelligent, educated and experienced, but could not handle the paperwork for their final hearing and the judge commented that the bundles were a mess.
- From observations in court and an interview with the father, both LIPs in E003 were middle class, relatively competent and capable, but they struggled procedurally and required extensive help from the Cafcass officer to negotiate an agreement.
- From her interview, the observation and financial evidence on the file, the LIP mother in B034 was a highly educated and articulate financial analyst who was very effective in putting her case in court. But the father's solicitor said in interview that dealings with her out of court were difficult and acrimonious.
- From observations and the interview with him, the professional father in C006 presented the image of being in control, but he appeared to be posturing to intimidate the mother and to have no real idea of how to conduct proceedings.
- The husband in E025 was, from financial information on the file, an officer in the services, and was observed to be very fluent and articulate, but was not able to identify or stick to what was legally relevant.

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<sup>24</sup> A summary of issues relating to perceived capacity and vulnerability for each LIP in the sample can be found in Table B.1, Appendix B.

Some LIPs were all too aware of their limitations, such as the mother in D024, a tertiary-educated professional observed and interviewed, whose solicitor appeared to have overestimated her competence in advising her to attend the FHDRA in person, where she found herself to be completely incapacitated by the court process. As Macfarlane observed after interviewing a highly educated sample of Canadian litigants in person, “The reality for many...is that despite their prior education and knowledge they still find the system difficult to understand, and far more intellectually and practically challenging than they initially expected” (2013:31).

### **Procedurally and legally challenged litigants**

Hunter et al. (2002:103-105) in their qualitative study of Family Court appeal cases identified three categories of litigants in person: ‘vexatious’ (discussed in the following section), ‘procedurally challenged’ and ‘vanquished’. Almost all of the LIPs that were observed fell somewhere on the spectrum between ‘procedurally challenged’ and ‘vanquished’, and those whose cases involved legal technicalities were generally legally challenged as well. Particular forms of procedural challenge included an inability to communicate directly with the other party due to high levels of animosity, distrust and/or fear; where they were facing a represented opponent, distrust of and refusal to engage in discussions out of court with the other party’s lawyer;<sup>25</sup> inability to prepare and file paperwork and comply with directions, especially disclosure in financial remedy cases;<sup>26</sup> and engaging in ‘litigation by correspondence’.

Repeated correspondence with the court from litigants in person fell into two categories. First were procedural requests and requests for procedural advice: wanting an adjournment, wanting to obtain a transcript, wanting to know how to comply with directions to file a response if the other party had not yet filed their statement, reminding the court to send correspondence to them rather than to their former solicitors, asking the court to take actions by letter rather than filing the appropriate application form. The second category of correspondence appealed to the court as the adjudicator of fairness, constructing a moral universe of complaint and justification and seeking the court’s intervention to resolve problems in the absence of anywhere else to turn. In these cases the court was bombarded with complaints about contact incidents, alleged inaccuracies in Cafcass reports and documents filed by the other party, and the other party’s litigation behaviour. The file in D019,

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<sup>25</sup> And see Section 3.5 below.

<sup>26</sup> And see Sections 3.3 and 4.5 below. Moorhead and Sefton also noted that LIPs had a lower intensity of activity/participation in their cases than their represented counterparts (2005: 253).

for example, was thick with handwritten correspondence from both LIPs, almost on a weekly basis, registering each party's version of the latest twists and turns in their long-running contact dispute. All of this correspondence, of both kinds, largely went unanswered.

Towards the vanquished end of the spectrum were those LIPs who clearly did not understand what was happening at court, were out of their depth, and had limited capacity to participate in any effective way, often due to the vulnerabilities noted below. These included LIPs who simply cried in court (B035, C021), or who were so paralysed by fear, overwhelmed or intimidated that they were incapable of advocating for themselves and their children (e.g. C003M, C018M, E014, E020, E030). Two LIPs – one a grandmother (C021) and one an incarcerated father (D016) – fundamentally believed that they had a right to see or bring up the child in question, but were incapable of demonstrating how this might promote the welfare of the child. Two others were severely impoverished but knew that without a lawyer they had no way of obtaining maintenance or any share of the matrimonial property held by the husband (E016, E018).

### **Vulnerability and incapacity**

A variety of personal and circumstantial disadvantages created additional challenges for LIPs in attempting to represent themselves in family proceedings. These vulnerabilities variously made it more difficult for LIPs to understand proceedings, to respond in a timely manner, to advocate for themselves, to focus on the proceedings, or to give them priority in the face of other serious problems they were experiencing.

Moorhead and Sefton suggested 11 indicators of vulnerability for litigants in person (2005: 70):

- being a victim of violence
- depression
- alcoholism
- being a young lone parent
- drug use
- history of imprisonment
- mental illness
- living in temporary accommodation with children
- illiteracy
- terminal illness
- involvement with social services



For this study each case in the sample was reviewed systematically to identify any evidence of vulnerability, with the analysis encompassing the observational data, interviews and the case file data for each case (see Appendix B, Table B.1). This analysis indicated that all eleven indicators of vulnerability identified by Moorhead and Sefton were present in the sample. Being a victim of domestic violence was the most frequently occurring single form of vulnerability in this sample, including cases involving a number of serious histories of abuse, harassment and/or stalking, resulting in ongoing fear and safety concerns. An illustration of the impact of severe mental illness on the capacity to self-represent was provided by the mother in A013, who had recently discharged herself from a psychiatric hospital. During her court appearance her behaviour was highly emotional and unpredictable. Both her verbal statements and physical behaviours were erratic and strange, e.g. speaking over everyone, being inappropriately light-hearted and informal, jumping on her chair, shouting, and insisting it was not a proper court because the judge was not wearing a wig. The LIPs in A004, A025 and B058 were visibly affected by drugs or alcohol. The father who was in prison in D016 was extremely disadvantaged, having very limited ability to prepare and no control over whether he would even be allowed by the prison governor to attend court.

Apart from those listed above, the researchers identified a number of other sources of vulnerability on the basis of the observations and interviews with Cafcass officers, lawyers and judges:

- physical disability/ill-health
- behavioural disorders such as ADHD and Asperger Syndrome
- learning difficulties – including two LIPs with borderline mental capacity to make decisions on their own behalf (B057, C026F)
- dyslexia
- difficulty controlling emotions
- extreme nerves and anxiety – causing sleeplessness, vomiting and panic attacks (e.g. D014W, E016, E019)
- language difficulties, ranging from those who spoke moderate to no English, two of whom appeared in court without interpreters (B062H, D001)

In total, around half of the LIPs in the observation sample suffered from one or more of these vulnerabilities. As noted above, being a victim of domestic violence, abuse and/or harassment was the most frequently occurring single form of vulnerability, with other forms of vulnerability occurring in small numbers in the sample. What is notable, therefore, is not that any particular forms of vulnerability (other than domestic violence) were prominent in the

sample and can therefore be expected and catered for, but that the LIPs who were observed presented with a wide range of individual difficulties and disadvantages.

Since the interviews with LIPs and information on court files focused on their family law proceedings, the researchers were not in a position to be able to detect the existence of 'problem clusters' of the type identified in studies by the Legal Services Research Centre, particularly in relation to lone parents (e.g. Pleasence et al. 2004, 2006). However, a number of the LIPs in the sample had multiple vulnerabilities, for example:

The respondent LIP father in A004, as well as being affected by alcohol at the observed hearing, had ADHD, was receiving psychiatric treatment, and had convictions for drug offences.

The applicant LIP wife in E016 used crutches and had no internet access at home. She explained in interview that:

I have not slept since Friday night. I was up all night Saturday and I was up all night last night getting this paperwork to come in today. I am too tired to give a monkey's and my son has been poorly so I... Every other time I have been physically sick with the stress and worry and meeting deadlines and the first time was horrendous, it was just really bad, I did not sleep for three or four nights before, erm... I had panic attacks, I had chest pains, it was horrible. The times in between have been as bad.

Multiple vulnerabilities appeared to be particularly associated with experiences of violence, abuse and harassment, and with mental health problems.

Clearly, vulnerabilities both varied in severity and had a greater or lesser impact on LIPs' capacities to represent themselves. In general, Table B.1 in Appendix B shows that LIPs' vulnerabilities were more likely than not to compound the legal and procedural challenges of their case, and in a number of instances tended to push them towards the vanquished end of the capacity spectrum. Again, this could be caused by a range of vulnerabilities, including being a victim of violence or abuse; mental health, drug or alcohol problems; learning impairments, other physical or behavioural disabilities; illiteracy and language difficulties. The implications of this analysis are considered in Chapter 6 below, particularly section 6.4 which considers the need for practical and legal advice.

## Case complexity

The Civil Justice Council (2011:14) has noted that the nature of the dispute, including its legal complexity, may add to the difficulty of self-representation. Mather (2003:155) indeed has argued that while courts can help those with relatively simple divorce cases, those with “complex and serious problems” need representation. Yet many family law cases are far from simple.<sup>27</sup> Based on the observations and interviews, the researchers would suggest the following indicators of case complexity.<sup>28</sup>

In Children Act matters, the key issue is serious welfare and safeguarding concerns (whether or not these are adequately recognised by the court). Indicators include:

- being in the County Court
- appointment of a Guardian
- Local Authority involvement (including core assessments and s.37 reports)
- need for police disclosure
- need for a fact-finding hearing
- need for drug and/or alcohol testing
- need for DNA testing

Several of the cases observed ran into significant difficulties with drug and DNA testing in the absence of legal aid to pay for the tests and a legal representative to organise them. In some cases testing was abandoned because it was too difficult to achieve in the absence of legal aid (e.g. C001, E006). Yet as one focus group of Cafcass officers noted, since self-reporting is very unreliable, the independent evidence provided by testing is absolutely essential to equip the court to make safe decisions (Cafcass A1).

Financial remedy matters may include complex issues of both law and fact. Indicators of complexity in these cases include:

- problems with disclosure
- pension sharing and valuation
- valuation of a business
- effecting transfer of property when one party is refusing to sign

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<sup>27</sup> Indeed, Moorhead and Sefton considered that the only simple family law cases were divorce and adoption matters (2005: 18).

<sup>28</sup> And see Table B1 in Appendix B for indicators of complexity on a case by case basis.

- presence of intervenors or multiple respondents (e.g. D029, which involved disputed payments by the husband to charitable trusts, and was being transferred to the High Court for final hearing)

More generally, complexity may be evident in the presence of jurisdictional issues or extensive litigation alongside the main proceedings (such as specific issue, prohibited steps or enforcement applications, appeals of procedural decisions, domestic abuse proceedings, bankruptcy proceedings and so forth). Almost half of the observed LIP cases included one or more of the above indicators of complexity. As with personal vulnerability, case complexity compounds the procedural challenges for litigants in person and increases their likelihood of being vanquished.

## **2.6 Particular challenges posed by litigants in person**

A frequently expressed concern about litigants in person is that as well as experiencing difficulties with court proceedings, they create difficulties for the court system by means of unmeritorious applications, non-appearances and various forms of disruptive behaviour. This section examines these concerns and finds them occurring relatively infrequently in the sample. Non-appearances were the biggest issue, but these as well as other problems could often be explained by the procedural challenges and vulnerabilities that litigants in person faced.

### **Non-appearances**

Moorhead and Sefton identified a substantial group of 'inactive' litigants in person (2005:28). The data reported in this study is not comparable to Moorhead and Sefton since the only form of inactivity the research team could reliably identify was non-appearance by the litigant in person at the observed hearing, and at any previous hearings as revealed by the court file. In a smaller scale study closer to ours, Maclean and Eekelaar observed 50 family court hearings which included 18 litigants in person, of whom 8 did not appear. Since the research team did not target particular hearings but identified cases by reference to whether they included a litigant in person, the researchers may not have realised that parties who failed to appear were in fact LIPs, and so the observations are likely to underestimate the proportion of LIP 'no-shows'. In total, around one quarter of the LIP cases in the sample involved non-appearance by a litigant in person at the observed hearing and/or earlier hearings. This was more likely to occur in Children Act than in financial remedy cases and, not surprisingly, no-shows were far more likely to be respondents than applicants in this sample.

Where the reasons for non-attendance were known they were quite varied. They included not receiving notice of the hearing because it had been sent to the wrong address; inability to attend because of a sick child (this happened to represented parties as well, but their lawyer could appear without them), or their presence not being strictly required (e.g. respondents consenting to an application or an applicant withdrawing his application by letter to the court). In two cases, applicant mothers in children's cases seemed to have lost interest in their applications (A027, C002). Other reasons suggested by court staff and Cafcass officers in focus groups were mothers being too frightened or traumatised by the father's violence to be able to face coming to court and litigants missing hearings because they went to the wrong floor or the wrong building (Court staff A and B, Cafcass E).

The largest group, however, involved some form of refusal by a respondent to engage with the proceedings, in acts of passive or active resistance. These ranged from the father who wrote to the court, "My spiritualist advised me to do nothing and things would sort themselves out" (D002) to actively evading service, fending off attempts by Cafcass to contact them, avoiding making proper disclosure, failing to comply with directions and deliberately causing delay. There was little the court could do in these cases other than adjourn, attach penal notices, warn that orders might be made in the respondent's absence, and actually make those orders. In a handful of cases, however, what at first sight appeared to be resistance turned out to be more complex. For example in A023 the respondent husband was treated by the court as an active resister, but the file indicated he may in fact have been vanquished, feeling that he did not have the ability to represent himself and so simply leaving it to the court to make a decision. Similarly, the respondent in A029, who had caused a series of difficulties and adjournments due to his non-disclosure and non-compliance with directions, came across in interview as extremely procedurally challenged. He explained that he had not filed his Form E because he had no idea what a Form E was and that you needed a solicitor to tell you and he didn't have one. In C023, the respondent who had failed to engage with proceedings, resulting in numerous adjourned and vacated hearings, turned out to have been in prison when the case commenced, and claimed to have received no paperwork during that time. These examples suggest there is a tendency to assume that litigants in person are being uncooperative when they may not understand what is required.

### **Unmeritorious and serial applications**

There is a concern that litigants in person may bring unmeritorious applications which might not have been brought with the benefit of legal advice. However, the researchers observed only a handful of applications by LIPs that could be classed as unmeritorious, three of which were brought by grandparents (A012, B022, C021). At least as many applications brought by

represented parties could be considered unmeritorious (e.g. E002 – another grandmother, E017).

The literature also recognises a group of serial or vexatious LIP applicants who, although their numbers are small, have a disproportionate impact on the court system (Hunter et al. 2002:104; Moorhead and Sefton 2005:80-82; Civil Justice Council 2011:13, 16). The researchers identified only three cases of LIP serial applicants (A020, C012, D010), and again, found just as many represented serial applicants (A026, D005, D026). The notable point here is that all of the serial applicants were male, and in five of the cases the respondent mother/wife was in person. This, then, is another form of vulnerability experienced by women LIPs – that they may face a series of harassing applications by their ex-partner, which brings them back to court repeatedly and exhausts their funds (hence their LIP status), and, as illustrated in A026 in particular, as LIPs they do not know how to ask the court for an order restraining further applications.

### **Violent and aggressive litigants in person**

Lawyers interviewed from all five of the courts had stories of violent, aggressive and abusive litigants in person, including physical attacks on judges, lawyers, social workers and clients. They also pointed out that such behaviour may be a product of mental illness or, in the case of male litigants, may be a smokescreen for fear and insecurity – although it may also be simply an extension of their abusive behaviour towards the other party. Again, the researchers encountered only a handful of LIPs in the observation sample who were angry, aggressive, and disruptive, all in children's cases and all male, all of whom had extensive criminal records for violence and/or significant mental health issues (A004, A028, E014). Notably, too, at least one represented party was disruptive and extremely aggressive towards the LIP mother, repeatedly insulting and shouting at her, behaviour which was not restrained either by his lawyer or by the Legal Adviser or anyone else (C003). A Cafcass officer argued that given the dangers posed by these litigants to their children, ex-partners and everyone else, the courts should be much more robust in dealing with them rather than allowing cases to run on (Cafcass A1).

### **Other forms of disruptive behaviour**

Other difficult or obstructive behaviour by LIPs identified in the interviews with lawyers included fathers who insisted on their rights to their children and mothers who constantly raised allegations to obstruct contact, but these behaviours were by no means confined to litigants in person. Staff at Court D referred to “a hard core of very difficult people who cannot conduct litigation in any kind of reasonable manner”, e.g. refusing to recognise the court's

jurisdiction over them, reading out long prepared statements to the court and taking up an inordinate amount of the court's time, although the research team did not observe anyone matching this description in the sample. While disrupting proceedings by means of aggression and violence was a notably masculine behaviour, disruptive feminine behaviour was evident among a handful of mothers in contact disputes who engaged in active resistance to the proceedings by means of various delaying tactics such as moving house to avoid being contacted, selective non-attendance, not allowing the Guardian to see the child, not complying with directions for testing, occasionally combined with disruptive behaviour at court (A003, A006, A008, D015). In one case, a psychological assessment of the mother suggested that her behaviour was at least partly explained by the fact that she held genuine safety concerns which she felt were not being listened to by the professionals involved in the case. Here too, then, vulnerabilities are likely to be present and resistance may be a desperate attempt to avoid being vanquished.

## 2.7 Summary

The research team observed 151 cases involving 165 litigants in person. LIPs were more likely to be respondents than applicants, and male LIPs were more likely to be applicants than female LIPs. Cases in the County Court and financial remedy proceedings were more likely to have one party in person while cases in the Family Proceedings Court were more likely to have both parties in person.

The major reason for self-representation was inability to afford a lawyer, with only around one quarter of LIPs indicating that their appearance in person was wholly or partially a matter of choice. Some appeared in person at one or more hearings because difficulties with legal aid resulted in their practical inability to secure legal representation. In interviews, those in person for reasons of cost or difficulties with legal aid invariably felt they were disadvantaged by not having a lawyer to represent them.

Over half of the LIPs observed had had legal representation at some stage during the current proceeding and/or in previous family law proceedings. Patterns of partial representation included having a lawyer to begin with but losing them during the proceedings, having a solicitor providing assistance out of court but not representing them in court, and commencing proceedings in person but then obtaining legal representation. These different patterns affected LIPs' expectations of the court process and support needs.

Only a small minority of LIPs were able to represent themselves competently in all aspects of their family law proceedings. Even those with high levels of education or professional experience struggled with aspects of the legal process. The great majority of LIPs were procedurally (and, where relevant, legally) challenged in some way, with some having no real capacity to advocate for their own or their children's interests. A wide range of personal vulnerabilities were identified with around half of those observed experiencing one or more vulnerabilities which often added to their difficulties in self-representation and in some cases defeated their attempts to do so. A significant number were also trying to handle quite complex cases.

LIPs may create problems for the courts by reason of non-appearances, refusal to engage with proceedings, or, less often, violent and aggressive behaviour. While non-appearances may be quite common, the reasons for apparent resistance to court proceedings, as for violence and aggression, may often be related to litigants' vulnerabilities. Unmeritorious and serial applications did not appear to be brought any more often by the LIPs in the sample than by represented parties, although having to respond to these applications was another vulnerability faced by some women LIPs.



## 3. Before the Hearing

### 3.1 Introduction

Much of the work involved in a family case occurs well before the parties enter the courtroom. The court hearing stage is merely the ‘tip of the iceberg’ (Judicial focus group 1, Court D), given the considerable amount of work entailed in preparing a private family law case. The focus in this chapter is on LIP expectations, experiences and practice prior to their appearance in court. It covers two critical phases: the pre-court ‘paperwork’ period and then the time spent in the waiting room at court where traditionally lawyers will seek to reach agreement. The chapter identifies the key tasks that are essential for a case to progress smoothly. The report suggests that the current pre-court process and waiting room ‘strategy’, at least at the time when the research was conducted, were predicated on the basis of the standard pathway paradigm case – where both parties have representation throughout the pre-court and court phases of their case. That default position assumes the input of a knowledgeable professional at each stage in the pre-court process, one who is familiar with court procedure and judicial expectations. The chapter identifies the difficulties that LIPs experience in navigating a system designed for a fully represented case and what adaptations were being made to accommodate LIPs pre-court and in relation to particular pre-hearing tasks.

#### Key messages:

- Much of the work in a family case is conducted before and between hearings rather than in the courtroom itself.
- In the absence of a lawyer, launching a case and preparing for a hearing requires a LIP to undertake a wide range of demanding legal/technical tasks.
- Many LIPs struggled with handling paperwork. They also did not appreciate the purpose of disclosure or the expectation that parties should seek agreement where appropriate by using waiting room time to negotiate.
- The processes, procedures and the settlement-orientation of the family justice system remain predicated on a full representation model with two lawyers doing all the preparatory work.
- Support for LIPs during the preparatory stages is very limited.
- Errors and omissions in the preparatory work done by LIPs impact on court staff workloads and on the conduct of the hearing itself.

## 3.2 Considering an application

### Determining the legal merits and legal framing of the case

Moorhead and Sefton (2005:256) note that amongst other difficulties, LIPs struggle to translate their dispute into legal form, i.e. understanding the purpose of litigation, confusion of law with social and moral notions of ‘justice’, and identifying which legally relevant matters are in dispute. In a fully represented case, the applicant’s solicitor determines whether the case has legal merit and ‘translates’ the case into legal terms. Where the applicant is a LIP, the case undergoes no legal filtration. However, as discussed in Section 2.4 above, in almost half of the observed cases, LIPs had had previous legal representation and/or access to individual advice at some point. While this meant that a number of LIPs would have had a legal ‘reality-check’ on their case, others would not. A LIP who has not had access to any individualised advice or guidance as to the legal framing of their case may try to get ‘free’ advice from sources such as Cafcass, court staff, Citizens Advice Bureaux (CABx), university advice desks and duty solicitor schemes.<sup>29</sup> Observation at court B highlighted that the court counter is one of the few places where a LIP’s procedural and process needs (but not substantive legal needs) may be gauged. Sometimes those needs cannot be met there, i.e. the LIP needs legal advice and counter staff can only signpost them. However, at other times, the staff member may be able to discern and meet the LIP’s practical need, for example, a contact application or a divorce petition, provide the correct form, and explain about duplicates and the fee required. By contrast, counter staff at court C<sup>30</sup> did not distribute forms and consistently referred all enquiries to various government web pages and the CABx.

Where a LIP has had some legal advice or assistance, the impact of this ‘reality-check’ can be considerable, making the LIP at least aware of the general boundaries and possible range of feasible outcomes. If partial rather than comprehensive lawyer support is increasingly common, it is important to ensure that LIPs are able to access discrete elements of legal services, e.g. by obtaining initial legal support as to the legal parameters of their application. One District Judge suggested that some lawyers were reluctant to engage fully with unbundling of legal services<sup>31</sup> for a mixture of insurance and cost efficiency concerns; but

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<sup>29</sup> During the Court E court staff focus group, it was mentioned that there was ongoing discussion with the local branch of Resolution to establish a duty solicitor scheme outside of the court where people can go and seek advice and find out where they stand. See Sections 5.3 and 5.5 below for discussion of advice needs and availability of free legal advice.

<sup>30</sup> For further discussion of this finding see below at Section 3.3 and for a LIP perspective see Section 5.5.

<sup>31</sup> Where clients are unable to pay for a solicitor on the basis of a full service traditional retainer (where the solicitor undertakes all elements of the case for the client), a person may want to pay for discrete aspects of a legal service – such as completing a court form or drafting a consent order. This type of ‘pay-as-you-go’ service is also termed ‘unbundling’.

went on to say that it would be helpful if LIPs were able to go to a lawyer to get some preparation done, to organise the papers and to explain what happens in court: “if anything could be done to give (solicitors) reassurance that if there was, for example, a standard contract for two hours advice to help prepare the case, particularly in money cases, but it could apply to children as well, which was, as it were, coming down blessed from on high ... that might be a useful way forward” (Judicial focus group 1, Court D).

Without some form of informed guidance at these initial stages, a LIP faces great difficulties in attempting to understand and act upon the substantive law, particularly in court. For example, LIPs can struggle to find the relevant law, particularly when accessing unofficial websites. One Cafcass officer from the Cafcass focus group at court B suggested that it is a very emotional time for the LIP and that emotion ‘clouds everything’. This can lead to a LIP searching only for legal information that will support his or her view, neglecting conflicting material, resulting in the LIP’s position then becoming more entrenched.

### **Family Justice System expectation of settlement**

The observations and interviews with LIPs suggested that LIPs who have not had access to prior legal advice were in a doubly disadvantageous position: they had no idea how to frame their case in legal terms and no understanding of the modus operandi of the family justice system - the expectation of settlement (see Norgrove 2011:150). In the paradigm case, the parties’ solicitors were expected to focus their clients’ minds on the benefits of settlement. Without such settlement-orientated guidance LIPs were unaware that they were expected to engage in pre-court negotiation and other professionals within the family justice system or other information sources were left to emphasise the expectation of settlement. The expectation of settlement within the family justice system was highlighted by listing practices in some of the observed courts. In court E for example, court staff drew attention to the fact that several fully represented cases will settle in the run-up to the hearing and in order to squeeze in as many cases as possible, court staff will sometimes ‘double up’ listings: “If we have got a [one] day case then we might put another half a day case in there just in the hope that the first case is going to finish by lunch time.” That individual went on to suggest: “you can’t do that with litigants in person because to be frank if they are coming to court then they are probably not going to settle. ... They are going to need every ounce of that time for the discussions and for the judge to be able to pull everything together” (Court staff focus group, Court E). Even in semi-represented cases, lawyers suggest that it is “virtually impossible” to enter into pre-court negotiations with a LIP. Either it is like “communicating with a black hole”

or the opposite: challenging because of multiple non-professional communications coming from the LIP (Lawyer focus group, Court C).

At the point of the fieldwork prospective family court litigants were encouraged, though not required, to consider and enter into mediation prior to their court application. One question for this study was whether LIP cases were less likely to attend a Mediation Information Assessment Meeting (MIAM) compared with fully represented cases. In addressing this question the researchers noted whether there was a form FM1<sup>32</sup> on the court file of the observed cases. The figures however, need to be interpreted with one particular caveat; the FM1 figures are being reported with respect to the entire dataset, but FM1 forms were only introduced following the advent of MIAMs in April 2011. The research data was collected on contested cases between January and March 2013 but data was not collected on the date on which the contested application was begun. Consequently, although it is likely that the bulk of the sample launched their applications after April 2011, a proportion of the sample will consist of long-running cases where the application was commenced prior to the launch of MIAMs. The observed case sample therefore contained the following proportion<sup>33</sup> of cases with an FM1 not on file:

- No FM1 on file in 72% of fully represented cases
- No FM1 on file in 65% of semi-represented cases
- No FM1 on file in 84% of cases in non-represented cases

In cases where there was no legal representation on either side, only 16% had an FM1 on file, suggesting that applicants in cases with neither party represented may be less likely to attend a MIAM compared with those in semi- and fully represented cases. However, the difference was not great and substantial majorities of semi- and fully represented cases also lacked an FM1. It is also important to note the complexity of the data collected due to the numbers of partially represented LIPs in the sample which have not been accounted for in the FM1 breakdown.<sup>34</sup>

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<sup>32</sup> The FM1 form is designed to record the reason why attendance at a MIAM was either not required prior to issuing proceedings or why mediation was not proceeding or was deemed unsuitable. An FM1 is expected to be submitted in every case where proceedings have been issued. Submission of an FM1 form was, however, not mandatory at the time of the observations. The position regarding attendance at a MIAM has changed with the enactment of s 10 of the Children and Families Act 2013.

<sup>33</sup> It is important to recognize that this was a purposive rather than fully representative sample. Percentages have been included here to give an indication of the broad distribution of cases within this sample to facilitate within sample comparisons.

<sup>34</sup> On the issue of attendance at MIAMs and whether parties then attempt mediation, see further the secondary data analysis of the out-of-court dispute resolution study in Appendix D, and Bloch et al (2014).

Court staff highlighted a wide range of practice regarding acceptance of FM1s. Some courts very rarely, if ever, required staff to chase up FM1s (Court staff focus group, Court A), while other courts routinely asked for FM1s and returned an application to a solicitor if no FM1 was filed (Court staff focus group, Court C). However, even this court accepted that if a LIP lodged a C100<sup>35</sup> application without an FM1, the court staff would issue the application without it in order to avoid staff having to investigate whether the LIP had gone to a MIAM and then having to explain what the FM1 was. There was no obvious reason for these variations in local practices.

### 3.3 Making an application

#### Initial application stage

Various tasks need to be undertaken in the application stage by an applicant (or the solicitor):

- Obtaining the correct forms, including the application for the substantive order
- Completing and filing the relevant form(s)
- Copying sufficient duplicates of each form
- Finding out and paying the relevant court fee (or dealing with the relevant fee remission form and application)
- Knowing where to post / drop off the application form(s) and the fee remission application
- Obtaining information or having a realistic expectation about court timescales

In fully represented cases, the analysis of court files indicated that these tasks were not always done well. For example, in some cases, court staff had to write to a solicitor because a form was not filled out correctly. But on the whole, initiating documents in most fully represented cases were thorough and complete, which is to be expected in the 'standard pathway' case.

LIP applicants have to handle all aspects of their application. The researchers found LIPs experiencing many problems during this application stage.<sup>36</sup>

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<sup>35</sup> The form used to apply for, vary or discharge a residence, contact, prohibited steps, or specific issue order in Children Act matters

<sup>36</sup> And see Section 2.5 above.

...they (the forms) are quite technically quite hard in a sense that you know... there is a law of technicality which you know I am not really a law person, ... I am artistic and creative but I don't come from that field and this is to me like wow this is like pure science, you know big time... (B001, LIP applicant father)

Observation at court counters alongside interviews with LIPs and focus groups with court staff highlighted that LIPs have to find out which were the correct form(s) to use and then source the relevant form(s) themselves. Although some court counters (Court B for example) had a supply of forms for customers, other courts (for example Court C) would not supply the relevant forms but instead referred the customer to the HMCTS website, requiring them to download and print off the relevant forms themselves. This was relatively unproblematic for LIPs with internet access and a printer (as long as they could identify the correct form), but deeply problematic for LIPs with limited or no access to the internet or printing equipment, or for those who were computer illiterate. Some court staff from Court C conceded that they would occasionally print a form for someone who was really struggling but other court staff said that they would never do this because everyone could access a printer in a public library.<sup>37</sup> This problem was identified by the Court C lawyers' focus group. The solicitors observed that LIPs in that area had extremely low education and literacy levels and so could not manage the process. Nor were such LIPs able to use the form to convey to the court that they have a learning or mental health difficulty. Moreover, as both court staff and lawyer focus groups at court D identified, LIPs who require an interpreter cannot pre-identify this need on the court forms:

Twice now ... two litigants in person had turned up needing interpreters, and it was the first hearings, and we couldn't get past, you know, me saying hello, because there they were without a lawyer or an interpreter. So it just had to get adjourned for the court to appoint an interpreter. So I think that the first thing, before it even gets to court, the court's going to have to find out if they need interpreters. (Lawyers focus group 1, court D)

Once the application form has been identified, sourced and completed, the LIP must then file the correct number of duplicates, without which court staff have to spend time photocopying the necessary copies. However, the 'face-to-face' environment of the court counter as a typical support tool to resolve LIPs' problems is becoming more limited with a reduction in counter hours in some courts (Courts A and B) and a switch away from a drop-in service to

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<sup>37</sup> But see Section 5.5. below for the problems with relying upon libraries for access to the internet.

an appointments only system in others (Court C and E). The combined effect served to limit the extent to which court staff were able to support LIPs, as illustrated by the following observations at court counters:

Counter staff told us the Family Window was open every day from 10-2 (neither researchers had ever seen it open but counter staff said they must have just 'popped to lunch'). Counter staff said due to staffing shortages a phone line had been discontinued. Now that there was only one phone line this was always congested and this drove litigants to come into court and ask questions in person. This made them frustrated. (Researcher observation – Court counter, Court A)

There is a court counter on the 5<sup>th</sup> floor but the court is now piloting an appointments only system so a screen is pulled down at all times when the researchers pass. Signs direct people to call an 0845 number to make an appointment (these signs were in small print and not at all easy to understand) but the policy is clearly to try to resolve issues over the telephone. Only a handful of appointments (family and civil) are actually booked in each week. ... The area has the feeling of being deserted and redundant. (Researcher observation – Court counter, Court C)

One solicitor interviewed mentioned a concern that the telephone appointment system was not friendly to litigants on low incomes. The solicitor noted that LIPs were put in a call-waiting queue and reported that many of them were calling from pay as you go mobile phones.

### Subsequent handling of the case

In the standard 'default' case, the legal representatives are responsible for;

- Collating and completing the disclosure documentation (Form E<sup>38</sup> and supporting documents)
- Filing the necessary documents on time
- Complying with the Family Procedure Rules and Pre-Action Protocol (i.e. sharing information with the other side)

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<sup>38</sup> Form E is the statement for a financial order in financial remedy proceedings. It is a long and comprehensive document where the parties state their respective financial positions in applications for a financial order in contested proceedings. It can be found at: [http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court\\_forms\\_num=E&court\\_forms\\_title=&court\\_for ms\\_category=](http://hmctsformfinder.justice.gov.uk/HMCTS/GetForms.do?court_forms_num=E&court_forms_title=&court_for ms_category=)

- Writing and filing a draft consent order if the parties have reached agreement prior to or between hearings
- Identifying evidence requirements
- Handling correspondence with the court
- Administering any application for a decree nisi/absolute

The family justice system works on the basis that it is assumed that both parties (or more significantly, their lawyers) were able to manage a case by completing these tasks. That continued to be the case where both parties were represented. However, where one or both was unrepresented, the researchers noted many problems arising from LIPs' inability to undertake some of these essential pre-court 'paperwork' tasks.

LIPs often struggled to collate and complete the detailed disclosure documentation; they often filed papers too late and with too little or even too much information in them. Semi-represented financial remedy cases could give rise to specific problems relating to disclosure; the LIP could be reluctant or even refuse to disclose financial details to the other side, failing to understand the reasons for full disclosure and/or misunderstanding what the 'other side' would do with the information. The following example demonstrates a LIP's reluctance to disclose any financial materials to his ex-wife's lawyers owing to his mistrust of them. He therefore refused to deal with them other than in front of the judge. He had not complied with previous court orders and had therefore not disclosed any information.

She (W's barrister) even asked me, and she even said today, in the office that Mr [husband] refused to show me this paperwork. I says to her no, I says it's for the judge, for my defence. ... well I'm thinking well this is my evidence, she's fraudulently going into my account, why should I give you any information? (A029 LIP respondent husband)

The judge will have difficulty dealing with a case where disclosure has not taken place, whether because the LIP was incapable of completing a Form E, did not trust the other side or had an underlying desire to ambush them in the court: it focused all negotiation and discussion through the judge, and may have meant that adjournment was the only option:<sup>39</sup>

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<sup>39</sup> And see 4.5 below for the impact of no or incomplete disclosure in hearings.



... we tell [LIPs] that they can't ambush their opponents in the courtroom. I say it is not like on TV. You see it in finance cases. Or sometimes they will turn up with a half-completed Form E and a carrier bag of documents. You adjourn cases like those. You have to save them from themselves. (Court A, DJ interview 1)

Where a LIP failed to engage with the disclosure process, the represented party (if there is one) had limited options. They must continue to comply with the correct procedure. For example, in case A023, the wife's lawyers carried on with their client's own disclosure without waiting for a Form E from the LIP husband (which never came).

Although some LIPs demonstrated the classic 'wall of silence' regarding pre-court disclosure and information sharing, others understood the need for full disclosure and treated the other side's solicitor as a source of information (e.g. A021). However, as noted in section 2.5 above, the sample also included examples of distressed and floundering LIPs who repeatedly wrote to the court with desperate pleas for help and assistance. In case D027, the court response to this type of LIP was rather curt and unhelpful – a short note stating that they were "unable to assist". It may be appropriate for the court to develop a template response to multiple LIP enquiries, perhaps pointing out that the court has to remain impartial and with neutral signposting to any national and local sources of advice and support.

A further issue at this stage of the pre-court process arose in relation to Children Act cases. During the focus group with Cafcass officers at Court A, part of the discussion centred around how the nature of the first interview with a party changed if that individual had not had legal advice. Not only did the Cafcass officers suggest that those interviews took longer because solicitors were not present in the background to get the party to focus on the relevant issues, but it was suggested that LIPs were unaware of the court process and what was expected of them. Concerns were also expressed that applications from LIPs often omitted contact details, especially relating to the respondent. In those cases there was no solicitor readily available to supply the missing information. The result was that in some cases the pre-court safeguarding checks could not be completed prior to the FHDRA, including the required pre-hearing telephone call with each party to discuss any safety concerns. In circumstances such as these, the emphasis and focus in Children Act proceedings can be taken away from the child and their safety:

Cafcass officer: ... the potential for people to fall through the net and to result in really unsafe decisions being made I think is monumental really. ... there are occasions where things still happen now but at least there are some safeguards

in place and also if you've got a tenacious solicitor who's, you know, asked some really appropriate questions of their client and they feel able to talk to them about it, then those things can at least be flagged up.

Facilitator: And do you think then these sort of situations are more likely to happen because one party or other party's unrepresented?

Several: Absolutely.

Cafcass officer: Yeah, beyond a shadow of a doubt. (Court A, Cafcass focus group)

### **3.4 Waiting to go to court**

#### **A LIP's expectations about the court process**

Good, unambiguous signage and clear, understandable pre-attendance information was essential for LIPs to know where to go in the court. Represented clients would probably have been briefed on this, whereas LIP were unlikely to have had such support. Observations at two courts demonstrated LIPs' varied experience of signage and its impact on individuals trying to find their way to the correct courtroom.

We did not see anyone struggling to find anything during our time at Court C. Signposting inside the court waiting area is good. Parties are sent a letter telling them when and where they should attend and informing them (where appropriate) that they will have an appointment to speak to Cafcass before the hearing. We did not see LIPs asking questions of ushers, security guards or others. ... (We) did not see any LIPs experiencing orientation difficulties either. (Researcher observation from Court C)

Once through security...[there] is a large notice board with the daily list for each court. People are milling around here trying to find their cases. A woman speaks to me: "It's hopeless. My letter said it's before DJ X but I can't see him on any of the lists". Past that is the Reception Desk which is permanently closed. A notice on the Reception Desk says 'Please see attached list for all enquiries'. One member of security staff is floating, helping people with directions. Generally it ... would be utterly confusing and disorientating for anyone arriving for the first time. (Researcher observation from Court D)

Once the parties had found the correct courtroom the researchers found that there was no real difference between the fully represented cases and the LIP cases in terms of waiting time (i.e. between the listing time and actual start of the hearing). However, unless LIPs had been specifically informed, they would be unaware of the likely delay in getting in to see a judge or the reason for it: i.e. the core FJS expectation of settlement which they should be seeking to achieve whilst waiting. An early listing followed by a long period of time 'hanging around' (as one LIP viewed it) was not a positive customer experience, especially for those travelling long distances to come to court (e.g. the applicant father in E003). Furthermore, LIPs who were unaware that this time could be used to try to settle the case would usually dismiss any attempt to settle made by lawyers who approached them. The interview extract below highlights this theme.

No she (wife's lawyer) actually offered to talk to me earlier on. I thought well surely I shouldn't be talking to her. ... I found that strange.

*Okay, so what did you say when she asked you if you wanted to talk?*

"No thank you".

*And that was because...?*

Well I shouldn't ... I don't know, I just ... don't seem normal to be talking to the lawyer who's trying to enforce something against me. (C019 LIP respondent husband)

This approach in a semi-represented case can be contrasted with the paradigm fully represented case where both parties' lawyers would have briefed their clients about the expectation of settlement outside the doors of the court. A classic example of the standard pathway case can be seen in case B055, where all of the negotiation occurred outside of the courtroom and in the waiting room. The parties' representatives led this case and the District Judge had a very minimal role. The parties sat separately in the waiting area and only saw each other in the Judge's chambers for the short hearing at the end of a long day. By contrast, LIPs with no prior legal advice expected to see the judge and expected the judge to make a decision.

### **3.5 In the waiting room**

#### **The usher's role**

In three of the courts observed for this study (A, B and E), the researchers observed ushers carrying out the following 'standard' tasks:

- Signing in the parties, lawyers and other professionals or supporters.
- Liaising with the District Judge / bench / legal adviser as to who to call in next when in a block list.
- Being a two-way point of contact between lawyers, parties and other professionals attending a hearing and the person hearing their case – e.g. to communicate that the judge was ready to see the parties or wanted an update as to negotiations.
- Copying documents and/or orders on the day of the hearing.
- Suggesting other forms of support for LIPs (eg. PSU / McKenzie Friend). In case B060, the LIP respondent husband found out about the possibility of being assisted in court by a McKenzie Friend from the usher.
- Encouraging parties to negotiate. In case D017, for example, the usher attempted to encourage the unrepresented parties to reach an agreement prior to going in to see the judge. The parties tried, but without success.
- Ensuring the rules of the court were upheld. For example, in case E012 the LIP respondent mother informed the usher that she objected to the LIP father's father coming into court.

At the height of booking in activity, ushers in Courts A, B and E were extremely busy. Ushers were able to round up the relevant parties at their busiest moments largely because they already know and recognise most of the legal representatives. In the standard pathway case, the legal representatives were also usually able to recognise each other and so easily connect with others involved in their case. The situation was much more confusing for LIPs. It was evident that most lay parties arriving at the usher's desk – represented or not – felt confused, bewildered and anxious. Sometimes they had no idea which court they were looking for or even which floor of the building they were supposed to be on.

In Court D, ushers were present, but in very short supply, and so only some of the key tasks identified above were being undertaken. For example, these ushers had no signing-in role (instead a list was left on a desk for representatives and unrepresented parties to complete), but the observers did identify some liaison and availability as a 'physical' point of contact for LIPs, albeit more limited than observed at other courts. The importance of this physical availability for LIPs was identified by one of the ushers at Court D during that court's staff focus group:

The fact that there's someone there to say, "Yeah, look no problem, the case hasn't gone in yet, don't panic. ... When you go in there, you know, you've got to sit at the front. You've got to sit on the front row, in front of the microphone. Terminologies you want is yes or no, sir or madam", it's all these silly little things that they don't know, and it's having somebody out the front there, just to give them, you know, what would, in the scheme of things, is just the tiniest of heads up, but it just gives them that little bit of confidence to be able to go in there. ... So I think the important thing is, you know, make sure there's somebody there. (Usher at court staff focus group, Court D)

However, in Court C, the impact of ushers was very limited. The ushers in this court were not particularly active and were ordinarily ensconced in a pod behind a glass-fronted counter (like a bank counter). A tannoy system was in operation when they needed to call someone and they seldom left their pods unless they had to give something to a judge (which rarely happened). The impersonal and physical separation of the ushers may have deterred people from making enquiries of them. Ushers did report being asked questions about what a LIP had to do or about where they could get legal advice but the observers in Court C did not observe any instances of this. They did see some instances of ushers giving limited details about what would happen in court on the day (e.g. "there might be a bit of a wait" / "you will be called to speak to Cafcass").

### **Talking to and negotiating with the other party**

In the 'standard pathway' case, negotiation between the parties outside of the court doors is a fundamental element to the settlement process. These pre-court negotiations have one of two aims:

- To enable agreement to be reached: the subsequent hearing ensures that any agreement is fair and within the confines of the law.
- To narrow the range of issues for the DJ or Bench to decide so that the court can focus on the outstanding issue(s) on which the parties were not agreed.

The following is a classic example of the paradigm case where both sides' lawyers engaged in negotiation prior to the hearing, greatly reducing the judicial time required to deal with the case:

Much negotiation occurred in the court waiting room before the parties went into court. The hearing was listed for 10am and the parties and their lawyers went into court at 12.33pm. There had been lengthy negotiations between the lawyers and

they had made significant progress, with one question outstanding for the Bench to decide. (B023 fieldwork notes).<sup>40</sup>

In the standard pathway case, these negotiations were assisted by the fact that the lawyers knew the court building's physical layout and if required (and if available), would attempt to use a side consultation room. If the waiting room was large enough (court B for example), the lawyers would use a different part of the waiting room to conduct negotiations after having referred to their respective clients.

By contrast, LIPs tended to be unaware of side-rooms and were therefore likely to remain in the main waiting area, and in cases in which neither party was represented, negotiation outside of the hearing was non-existent or very limited; it was highly unlikely that parties would start to negotiate spontaneously. Ultimately, LIPs in a case in which neither party was represented did not use the waiting time constructively and needed guidance, focus and support to commence and sustain any negotiation at court.<sup>41</sup> Where a Cafcass officer or in-court mediator was present, some negotiation might take place, although the crucial element was that both parties trusted the third party to lead the negotiations.

This is a case where both LIPs were educated, youngish former cohabitants. Neither party had representation at court but the father, at least, had a few hours of advice early on. Both parties were relatively well able to represent themselves, though needed extensive help from the Cafcass officer to negotiate an agreement pre-hearing and a strong steer from the legal adviser [clerk to the justices] in the hearing to reduce conflict between them. The Cafcass officer spent 2+ hours with the parents individually to hammer out the deal in the absence of solicitors. We didn't see any interaction between the parties in the waiting room prior to the hearing and instead, the negotiation was via shuttle with the Cafcass officer. Even so there were hours of waiting around – something that the applicant father in interview was very critical of. (Case E003 field notes)

The situation and dynamic was very different in semi-represented cases. In those cases, the lawyer for one side (and possibly the Cafcass officer, if any, in some children's cases) would

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<sup>40</sup> Obviously not all standard pathway cases will settle. In the interview with the applicant wife's lawyer in case A005, the lawyer felt compelled to explain why the parties did not settle prior to the hearing – basically they started too far apart. But perhaps the most interesting point is the implication that lawyers expect to settle and this interviewee felt the need to explain why they do not always manage to do so.

<sup>41</sup> In case E029, neither the Cafcass officer nor the in-court mediator were able to broker an agreement between the parties. Interestingly, the parties were very close in terms of the issues, but they refused mediation even though the legal adviser was able to negotiate an agreement between them in court.

try to initiate discussion between the parties outside of the courtroom. However, there was a real possibility that the LIP might refuse to negotiate, believing that they were there to 'have their day in court and speak to the judge', rather than negotiate with the other party's lawyer. Trust was once again the crucial issue in the waiting room negotiation process, especially the LIP's trust of the relevant professional involved in their case. Where the professional negotiator was not trusted, negotiation would invariably be unsuccessful.

*Okay, so there's been an agreement there, you obviously haven't had any problem then negotiating with the other side?*

No, the other side came to us today and said "Right, um the ex partner agrees to the contact in the contact centre" as opposed to no contact until Cafcass has completed its report.

*So you were happy with that, so you were able to agree with it because that was your position?*

Absolutely, yes.

*Okay, do you think that you can trust the other side's solicitor?*

Yes.

(A022 – Interview with LIP mother's McKenzie Friend who had been present throughout the negotiation process between the father's solicitor and the mother).

Those LIP cases which settled appeared to be those that have help of some sort, but this had to be effective help, not uninformed assistance. Case A030 provides an excellent example. The represented mother was applying to remove the child to another jurisdiction, the LIP father opposing. The case was listed for 10.30am and it got into court after 4pm, taking only 10 minutes before the DJ. The rest of the day had been taken up with negotiating and drafting. In the informal judicial interview, after what could have been a very difficult case, the presence of amenable counsel and an experienced and knowledgeable McKenzie Friend<sup>42</sup> were highlighted as being crucial:

This case I did not think would settle as he (father) was on his own and she had too much to lose. ... He was lucky because the McKenzie Friend he got was better than most advocates and the [lawyer] for the other side is a lovely [person]. It was an ideal combination. ... Some haven't got the ability to do what the McKenzie Friend achieved today. I saw [MF] at the last hearing and I was impressed. (Case A030: Notes from informal judicial interview after the case)

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<sup>42</sup> In this case the McKenzie Friend was highly unusual in having had many years of experience as a social worker. For more on McKenzie Friends see Chapter 5.6 below.

Another important factor highlighted in that case, but also seen elsewhere, was the difficulty in negotiating with a LIP who had brought a group of supporters with them to court. In this case, the McKenzie Friend specifically mentioned in interview that if she had not been present to interpret the other side's offer, then it was likely that the LIP would have been wound up by his family and so ultimately not agreed with the offer made. In the lawyer focus group from Court E, one solicitor also suggested that it is very difficult to negotiate – particularly to narrow the issues down – when a whole host of 'other' people are present.

A further problem associated with attempts at negotiating in semi-represented cases is that the represented party may feel aggrieved at the additional, 'free' support and assistance that the LIP was getting when they were paying for their own solicitor. In some semi-represented cases, particularly where a client had not got a good relationship with their own solicitor, they might feel angry at the extra support that the LIP had been getting and the face-to-face contact that the LIP was having with their solicitor. Moreover, lawyers' attitudes and approach to negotiation with LIPs could also vary, some happier to undertake it than others. For example, during the Court A judicial focus group, one District Judge referred to the fact that he had to give a solicitor a 'talking to' for not negotiating with a LIP.<sup>43</sup> As with judicial style,<sup>44</sup> what, if any, assistance a LIP receives from the other side's lawyer in a semi-represented case depends on the lawyer's particular approach. Any future reforms will therefore need to be alert to the varying and variable lawyer as well as judicial styles and have strategies in place to deal with this.

### 3.6 Summary

Much of the work in a family case is conducted before and between hearings rather than in the courtroom itself. The list of tasks to be accomplished in the pre-court and between-hearing phases is quite extensive and technically and practically demanding. The list includes determining legal merits and translating a dispute into legal form; consideration of mediation; making an application using the correct form and filing and serving correctly; possible negotiation with the other side in the waiting room and subsequent handling of the case (e.g. handling disclosure, preparing and filing statements).

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<sup>43</sup> See case B034 where the lawyer during interview in that case suggested that they were not being paid to give guidance to the LIP as that was unfair on their own client.

<sup>44</sup> See Chapter 4.6



The successful completion of these tasks was important for the smooth running of the case and for timely and effective hearings. The extent to which LIPs were able to complete those tasks was highly variable. Understandably, many LIPs struggled with a range of technical tasks, including understanding which application form to use, how to complete it and how to file and serve correctly. Some LIPs faced practical problems such as an inability to access or print out online forms. Many LIPs also did not grasp foundational legal principles or concepts such as the importance of disclosure or the expectation of negotiation or settlement.

A significant part of the problem is that the family justice system and the pre-court processes, procedures and tasks are predicated on a full representation model with two trained and experienced lawyers undertaking all these preparatory tasks. At least at the time of the fieldwork, there had been limited adaptation of processes to support LIPs and instead LIPs were largely required to comply with existing processes. There had been comparatively little adaptation of documentation (forms, guidance, letters from court etc) to meet the needs of LIPs. There was limited face-to face contact, advice and support at all stages of the pre-court process and on arrival in the court building before the hearing. The support available from court service staff varied locally but was constrained by concerns about straying into giving legal advice. The reduction in court counter hours and switch to an appointment system in some courts has reduced further the opportunities for face-to-face support.

The challenging and complex nature of the pre-hearing tasks, coupled with limited support and advice, was a source of anxiety and stress for many LIPs. It also had consequences for court service staff workloads as they had to deal with correspondence from LIPs or pick up the errors or omissions in LIP paperwork. Some of the problems also had a significant impact on the conduct of the hearing itself. Those issues are considered in the next section of this report.

## 4. In the Courtroom

### 4.1 Introduction

In this section the focus turns to how LIPs fare once they enter the courtroom. The section explores the range of cases involving LIPs, what (if any) adaptations were made to accommodate LIPs in the hearing itself and consider what factors appear to be associated with more or less positive outcomes in these cases.

The section begins by outlining the core features of fully represented hearings as a benchmark against which to compare LIP cases and analysing quantitative data on the number and length of hearings in the sample of 151 cases. A typology is then presented that is designed to illustrate the range of LIP cases and the factors associated with more or less positive outcomes. The section concludes with an analysis of the main challenges to a fair, efficient and effective hearing involving LIPs.

#### Key messages

- LIP hearings were far less standardised and predictable than fully represented hearings.
- There was considerable variation in who picked up the missing lawyer's tasks - a LIP, the judge, the lawyer for the represented party or nobody. There was also variation in how effectively those tasks were done.
- LIP cases appear less likely to settle and may require longer hearings and more hearings. A larger quantitative dataset is needed to test this finding conclusively.
- Some LIP hearings work better than others. Courts and LIPs manage better with relatively simple cases, at directions rather than substantive hearings and with calm and competent LIPs. The availability of additional professional (legal) support for the LIP was often key to success, whether a supportive lawyer on the other side, a children's lawyer or an activist/inquisitorial judge.
- Ensuring equality of arms between parties is a real challenge, notably when a LIP is unaware of their legal entitlements and/or unable to do justice to their case.
- Preparation of bundles and cross-examination were beyond the capacity of most LIPs without considerable help.

## 4.2 All the world's a stage: the full representation default

It was noted in Chapter 3 above that the court process is predicated upon a full representation model. This becomes even more apparent once LIPs reach the courtroom. The system is based on an adversarial, full representation model with two lawyers presenting their client's cases to an impartial arbiter – the judge – who will make a decision. The role of the lawyers is vital. If one were to think of a court hearing as a stage play, the two lawyers would be the actors on the stage. They are at the centre of the action, doing all the stage-work to present the play (their client's case). The judge is the director giving some guidance on how the actors play their roles and ultimately deciding the future of the play, i.e. making a decision. The parties are the audience. They will have been briefed by their lawyers about what is likely to happen, much like reading a theatre programme. They are likely to review the play with their lawyer-actor afterwards. In the play/hearing, however, they are mostly watching, rarely acting. These distinctive roles are evident in Case Study 4.1, an account of a typical fully represented review hearing, where the lawyers were centre stage, the judge was directing proceedings and the parties were just watching events unfold.

### **Case Study 4.1: Fully represented case (E001: Review hearing in a FPC)**

*Pre-hearing:* The two solicitors negotiate for an hour in the waiting room. The result is a four page draft consent order which they hand in to the court prior to the hearing.

*Introductions:* All enter. The only introduction is a 'Thank You' from the Legal Adviser (Clerk to the Justices) to the applicant's solicitor as a cue to start presenting the case.

*Presentation of the case:* The applicant's solicitor then updates the court, summarising the proposed order (for interim indirect contact and a two day fact finding hearing on contested allegations of domestic violence). There are further highly technical exchanges between the legal adviser and the two lawyers about the number of allegations and length of hearing needed.

*Ending:* The legal adviser decides an intermediate directions hearing is required. The two lawyers are asked to amend the draft order accordingly, obtain a hearing date from the court office and then to e-file the directions to the court within 48 hours. All exit.

This case study exemplifies the scripted nature of fully represented hearings. Fully represented hearings were not improvised. They were highly patterned and predictable in format. There was a clear, established way of doing things that was so familiar to the lawyer/actors and judge/directors that they did not need instructions or explanations to come in prepared to put on a fairly polished performance. Both the lawyers and judges were highly trained professionals who, as repeat players, had performed similar plays many times before.

The result was an effective performance that runs exactly to time. The hearing described above took 15 minutes of stage time.

The case study does not illustrate all the tasks necessary to put on a longer play, such as a contested trial. Table 4.1 lists the main tasks and processes required to complete a range of hearing types, underlining the central role played by the lawyers in fully represented hearings.

**Table 4.1 Roles, processes and tasks in fully represented hearings**

<b>Process or task</b>	<b>Judge</b>	<b>Lawyers</b>	<b>Parties</b>
<i>Giving instructions*</i>			<u>∅</u> (pre-hearing)
<i>Giving legal advice to parties*</i>		<u>∅</u> (pre-hearing)	
<i>Preparing the case, disclosure etc*</i>		<u>∅</u> (pre-hearing)	<u>∅</u> (providing information)
<i>Negotiating any settlement or narrowing issues, if possible*</i>		<u>∅</u> (pre-hearing)	<u>∅</u> (consulted on proposals)
Directing parties where to sit		∅ (briefed before the hearing)	
Providing introductions, ground rules, process signposting	∅ (minimal beyond cue to lawyer to start)	∅ (briefed before the hearing)	
Introducing the case		∅ (applicant's lawyer)	
Providing/eliciting evidence, including cross-examination	∅ (supplementary questions)	∅ (leading evidence, cross examining)	<u>∅</u> (fact-finding or final hearings: giving evidence)
Receiving/hearing evidence	∅		
Keeping to legally relevant topics and issues in dispute	∅ (may give some limited steer, often 'coded')	∅	
Conforming to expected norms re turn-taking and routing contributions through the judge		∅ (Strong adherence to turn-taking rules. Ask permission to speak if out of turn)	

Maintaining order/ensuring appropriate behaviour		<input type="checkbox"/> Emotional buffer, role to control/ manage clients	
Summing up		<input type="checkbox"/>	
Making/rubber-stamping a decision	<input type="checkbox"/>		
Checking the parties understand what has been ordered and what must happen next		<input type="checkbox"/> (after the hearing)	
Drafting orders and filing with the court		<input type="checkbox"/>	
Follow-up tasks, e.g. referral forms to a contact centre, organising tests etc.		<input type="checkbox"/>	

\* Discussed in Chapter 3 above.

Given the dependence of the court on the lawyers, it must be asked how the process works if one or both are absent. How does the play go on when one or both professional actors is missing? Who picks up their roles? Can a member of the audience step up to the actor/lawyer role without any training or previous experience? Can one actor/lawyer cover for the other in semi-representation cases, or would they just dominate the performance to the detriment of the amateur? What if there are no lawyers? Does the whole production break down or can a performance where both actors are amateurs work satisfactorily? These are the key questions that are explored in the following three sections.

### 4.3 Case and hearing length – a quantitative snapshot

This section begins by looking at the impact of LIPs on the length of the play and how it ends. The evidence from other research has produced rather mixed results on whether LIPs have an impact on case length and outcomes (see Williams 2011). However, Moorhead and Sefton found that family cases with LIPs took longer and that LIPs were less likely to settle (2005:257). They also found that LIPs participated at a lower intensity but made more mistakes (2005:255).

As part of the analysis of settlement rates and timings, the research team were able to draw upon secondary analysis of a recently completed study of financial settlements on divorce.<sup>45</sup> Analysis of the contested applications in that survey indicated that cases where one or both parties did not have representation throughout the case (or at all) were less likely to settle than those in which both parties were represented throughout. Furthermore, those cases involving LIPs that did settle were likely to do so at a *later* stage of the proceedings than those in which both parties were represented throughout the case. The findings from this cross-sectional study cannot prove causation or address the potential impact of unobserved characteristics on settlement. However, the findings are consistent with the Moorhead and Sefton study.

For the main study the team were also able to draw upon the quantitative data collected as part of the observation of 151 hearings and case file analysis. This data included the length of the hearing, the number of hearings and adjournments, observer-rated process problems and case outcome (or disposal). It should be remembered, however, that the observation sample is relatively small and is non-representative. It is included here for two reasons. First, it provides a context for identifying issues to explore in further depth with the qualitative analysis. Second, it identifies preliminary findings to test with larger and representative samples in future research.

*Hearing length.* The average (median) hearing length for 150<sup>46</sup> observed hearings was 19 minutes. There were differences between the different types of representation groups. Hearings involving one LIP (semi-represented cases) were significantly longer ( $p=0.047$ <sup>47</sup>) than fully represented or non-represented hearings, at 25, 17 and 15 minutes respectively. However, the type of hearing also appeared to make a difference. Thus no difference was found in the average length of hearing between the different representation types for the shorter procedural hearings.<sup>48</sup> In those types of hearing the focus was on working out the next steps in the case rather than making substantive decisions. However, there was a significant ( $p=0.01$ ) difference between the representation types when it came to *substantive*<sup>49</sup> hearings. Those were hearings in which the cases of both parties were set out

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<sup>45</sup> Hitchings, Miles and Woodward (2013). The study was funded by the Nuffield Foundation. A full description of the study methodology and the findings referred to in the text here can be found at Appendix C. We are grateful to the Foundation for allowing analysis of the data relating to legal representation to be included in this report.

<sup>46</sup> Start and finish times were not recorded for one case.

<sup>47</sup> Kruskal-Wallis test for more than two independent groups..

<sup>48</sup> That is first directions (FDA, FHDRA), directions, review and approval hearings. See glossary for an explanation of the terms.

<sup>49</sup> That is FDRs, fact finding, interim, maintenance pending suit and final hearings.

and evidence might be tested through cross-examination. In this sample it was the semi-represented substantive hearings that appeared to account for the difference between groups. Thus the median length of a semi-represented substantive hearing was 90 minutes, in contrast with 39 minutes for a fully-represented substantive hearing and 13 minutes for non-represented substantive hearings. However, the numbers of substantive hearings were small<sup>50</sup> and a larger sample is needed to test differences in hearing length by representation and hearing type.

What might account for the apparent differences in hearing length for substantive hearings? In semi-represented cases the researchers did observe judges spending more time explaining the process to the unrepresented party as an attempt to ensure equality of arms between the parties. Further, the team also observed judges permitting the unrepresented party far more leeway in how they conducted their cases, again apparently as a means to redress any perceived power imbalance. In case B034, for example, the judge conducted extensive introductions and signposting of the process for the benefit of the unrepresented mother as well as giving her opportunities to ask questions outside of the normal sequence of a hearing. The capacity and orientation of the LIP also appears to be influential. The researchers observed cases where a combination of an over-confident but unfocused LIP and a judge taking a traditional non-interventionist role resulted in long and rambling hearings.<sup>51</sup>

The relatively short length of the substantive hearings where neither party was represented also requires explanation. How did two LIPs manage to present their cases and cross-examine their opponent so speedily? In fact, closer examination of the nine non-represented substantive hearings indicates that none of them ran as standard hearings where evidence had to be presented and tested by the two LIPs. These cases were either uncontested (C024, D013), withdrawn following an adverse Cafcass report (C012) or only one party attended (B032, B056 and E018). The result in each case was that the hearing was either curtailed as it could not achieve its purpose or only a short hearing was necessary. D013, for example, was an uncontested Special Guardianship case where the judge dealt with the application speedily but with great sensitivity.

The remaining non-represented substantive hearings (B063, C025 and C026) did run as contested hearings. However, rather than relying on the two lay participants to conduct the

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<sup>50</sup> There were 12 fully-represented, 22 semi-represented and 9 non-represented substantive hearings.

<sup>51</sup> See the 'over-confident LIPs' Table 4.4 below.

cross-examination the judge conducted the hearing in a entirely interventionist or inquisitorial style, taking responsibility for asking all the questions. Whilst these judge-led cross-examinations were effective at getting at the relevant issues and efficient in terms of court time, there were costs in terms of judicial preparation time. The judge in B063, for example, a final hearing in a financial remedy case, noted that she had had to undertake considerable pre-trial preparation given the poor state of the bundles.<sup>52</sup> These hearings were also extremely demanding on the judge as one professional was required to take on three roles of judge and lawyer for both parties, whilst also ensuring a fair, just and efficient process.

*Case trajectory.* For each of the observed cases, the researchers also scrutinised the court file to identify the number of hearings and adjournments in that set of proceedings. LIP status was categorised based on the position recorded at the observed hearing, although of course this might change over the course of proceedings.

With that caveat, the research team identified 28% of LIP cases where at least one adjournment appeared to be a consequence of one or both parties being in person. There was no difference between semi- and non-represented cases in the number of adjournments.

In terms of case trajectories, the file analysis indicated that semi-represented cases in the sample had a median three hearings compared to two hearings for fully and non-represented cases. The difference was statistically significant ( $p=.019$ <sup>53</sup>).

One reason why non-represented cases may have fewer hearings was the higher proportion of withdrawn or dismissed cases. Indeed, as indicated in Table 4.2 below, nearly a fifth of non-represented cases in the sample were withdrawn or dismissed compared to just 5% of fully represented cases and 3% of semi-represented cases. The analysis of the case files and observations suggest that some of these withdrawn non-represented cases lacked legal merit but in others, one of the parties seems to have been vanquished.<sup>54</sup>

*Hearing outcome.* The analysis also explored how each hearing was concluded. A substantial proportion of the cases in the observation sample were at the start or mid-point of their case trajectory. Not surprisingly, therefore, half of the observed hearings ended by being listed for a further hearing, with no difference by representation type in those ongoing

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<sup>52</sup> See Section 4.5 below for further consideration of efficiency and effectiveness.

<sup>53</sup> Kruskal-Wallis test for more than two independent groups.

<sup>54</sup> For example, Case B022 a case involving a grandparent application for contact. See Section 2.5 for further discussion of vanquished litigants.



cases. There was one important difference, however, in *how* the cases that were concluding reached that resolution. Fully represented cases were more likely to be resolved with a consent order and less likely to require adjudication than semi- or non-represented cases. Only 5% of fully represented cases required a judicial decision, compared to 16-18% of LIP cases (Table 4.2).<sup>55</sup> Three of the semi-represented cases were ongoing (bitterly contested) multi-day hearings where the outcome was not known and so they have not been included in Table 4.2. The likelihood, however, is that the three cases ended up being adjudicated. If so, that would mean that 21% of semi-represented cases would have been adjudicated compared to 5% of fully represented cases. This difference is consistent with the analysis of pre- and between-hearing behaviour reported in Chapter 3 above where the contrast between the settlement-orientation of lawyers in fully represented cases was compared to cases involving LIPs who were generally not aware of, or suspicious of, the expectation of negotiation.

**Table 4.2 Case outcomes following the observed hearing by representation status**

Case outcome	Fully rep	Semi-rep	Non-rep	Total
Judicial decision	2 (5%)	13 (18%)	6 (16%)	<b>21</b> <b>(14%)</b>
Consent order	11 (29%)	13 (18%)	5 (14%)	<b>29</b> <b>(20%)</b>
Listed for further hearing	23 (61%)	45 (62%)	19 (51%)	<b>87</b> <b>(59%)</b>
Withdrawn/dismissed	2 (5%)	2 (3%)	7 (19%)	<b>11</b> <b>(7%)</b>
<b>Total</b>	<b>38</b> <b>(100%)</b>	<b>73</b> <b>(100%)</b>	<b>37</b> <b>(100%)</b>	<b>148</b> <b>(100%)</b>

Percentage totals may add up to more than 100 due to rounding.

Whilst the researchers would caution that this is a small purposive sample, the quantitative findings from the observation sample are interesting. They suggest a rather mixed picture. As might be expected, in this sample, fully represented cases were more likely to be resolved by consent than LIP cases and more likely to have fewer and shorter hearings than semi-represented cases. Cases in which neither party was represented appeared more likely to collapse than other types of cases. These findings will need to be tested on a larger representative sample before firm conclusions can be drawn. If replicated, then the findings raise issues about possible increased pressure on court listings and judicial time following a reduction in full representation cases. The apparently higher incidence of non-represented

<sup>55</sup> Not tested for statistical significance due to the large number of low cell counts.

cases collapsing may raise issues of justice where LIPs are unable to present their cases effectively. Alternatively, it may imply a need for more effective advice and support at an earlier stage to prevent cases coming to court.

That said, it is also clear, that many LIP cases appeared to proceed relatively smoothly, at least in terms of the limited number of quantitative indicators of case duration, hearing length, adjournments and method of reaching disposal. To explore what made some LIP cases more manageable than others, the next section leaves behind the quantitative data and returns again to the qualitative data based on the observation of the hearings and interview material.

#### **4.4 A typology of ‘working’ and ‘not working’ LIP hearings**

The observation of hearings indicated clearly that LIP hearings were far less standardised or scripted than the fully represented model described in Section 4.2 above. Some LIP hearings were relatively close approximations or adaptations of the fully represented model; others looked very different. The researchers developed a typology of eight types of hearing to capture this variation in how LIP hearings proceeded. These are set out in Tables 4.3 and 4.4 below. The typology facilitated identification of some of the factors associated with the variation between cases.<sup>56</sup>

The typology also enabled some qualitative evaluation or judgement of the different types of hearing. The researchers divided the eight types into two groups: the ‘working’ hearings that appeared to be relatively efficient, effective and fair (Table 4.3) and the ‘not working’ hearings that appeared to be either inefficient, ineffective and/or unfair (Table 4.4). The primary purpose in developing the typology was to identify the range of case pathways and outcomes and what factors might account for that variation. The researchers found that, in broad terms, the groups were relatively evenly distributed amongst our sample. The one exception was what was termed the ‘unprotected’ LIPs’ group (see Table 4.4 below) which appeared to be smaller than the other seven groupings. Of course, the sample of 151 cases

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<sup>56</sup> The typology was derived inductively from all the material associated with each case, rather than starting with a pre-existing framework. The researchers used a process of constant comparison to identify the relevant features of a group. They did this by first selecting a few hearings that seemed to share similar features. For example, the researchers were aware of a few cases in the sample involving highly volatile LIPs who appeared to have mental health and drug or alcohol problems and where the court deferred making a decision on the day. The researchers went through the entire dataset systematically to identify all cases sharing that pattern, whilst simultaneously refining the description of shared (and any dissimilar) features. The shared core characteristics were then set out. This grouping, which was subsequently labelled the ‘hot potato hearings’ was developed further by comparing and contrasting with other types of cases (see Tables 4.3 and 4.4 below). The researchers then began working through the other cases in the sample, grouping together cases that seemed to share similar characteristics and using this process of constant comparison to distinguish their core features from other groups.

is relatively small and was not intended to be representative. That said, it is helpful to understand that all of these type were well-represented in our sample rather than being isolated or single examples. The likelihood, therefore is that these types of LIP cases may well appear in other courts in reasonable numbers.

Two clear messages can be garnered from Tables 4.3 and 4.4. The first is that some hearings involving LIPs did appear to work whilst others did not. Second, that there was not one single reason for hearings working or not working. In other words a hearing could work, or not work, for very different reasons or combinations of factors. The combinations of factors are discussed below.

**Table 4.3 ‘Working’ hearings – apparently reasonably fair, effective and efficient**

Hearing type	Description	Essential Features	Evaluation
<b>Umbrella semi-represented</b>	A lawyer-led process where the lawyer for the represented party in a semi-represented case worked to progress the case non-adversarially, effectively extending a ‘legal umbrella’ to the LIP. The lawyer initiated pre-hearing negotiations with the LIP, possibly resulting in a draft consent order, presented the case on behalf of both parties, drafted the order and undertook any outstanding tasks, e.g. organising tests. The judicial role was very similar to a fully represented case.	<p>Semi-represented cases only.</p> <p>Typically less complex cases: mainly Children Act, directions or financial approval hearings. Not final hearings. Parties were agreed on the next steps in the case.</p> <p>The LIP was able to take a straightforward and constructive approach. The lawyer was settlement-oriented and prepared to take on additional workload.</p> <p>Case example A003.</p>	<p>Appeared productive and efficient. All parties were broadly satisfied with the process.</p> <p>The represented party may carry additional costs owing to the extra workload on their lawyer.</p>
<b>Third party (quasi) lawyer</b>	A neutral third party acted as broker with both LIPs in non-represented cases. The third party was usually ‘representing’ the child, whether a Cafcass court duty officer or formally as a children’s lawyer in a rule 16.4 case. He/she undertook some/all of the roles undertaken by two lawyers in a fully represented case, i.e. identifying positions, pre-hearing negotiations, presenting the case, drafting the order. The judicial role was very similar to a fully represented case.	<p>Typically Children Act cases where both parents were unrepresented.</p> <p>Fairly high conflict cases.</p> <p>Directions and final hearings.</p> <p>Case example D020.</p>	<p>Efficient and effective. All parties appeared broadly satisfied with the process.</p> <p>The cost was borne by public bodies, e.g. Cafcass.</p>
<b>Fully inquisitorial judge</b>	<p>Judge took on the role of lawyer(s) and judge.</p> <p>Directions hearings: very active process of agreement-seeking in the courtroom led by the judge, who elicited positions, looked for</p>	<p>Typically non-represented cases but some semi-represented and cases with a non-attending party. A joint approach by the clerk/legal adviser and District Judge in some courts.</p>	<p>Efficient in terms of reaching speedier resolution. Parties generally satisfied with process. Query whether positions were fully elicited, especially complex financial cases.</p> <p>Placed very significant demands on the</p>

	<p>common ground and attempted to broker an agreement.</p> <p>Substantive hearings: judge gave a very strong steer or took over cross-examination from the LIP(s) before deciding the case.</p>	<p>Wide range of case and hearing types.</p> <p>LIPs cooperative with the process but perceived to be unable to manage without considerable assistance. Judge willing and able to take a very activist role.</p> <p>Case examples E029 directions, B063 final</p>	<p>judge to keep order, elicit facts, take notes, give judgment and draft the order. Query the sustainability of the approach and judges' ability to handle long lists with this approach.</p> <p>Costs were largely borne by the judge's greater preparation and court time.</p>
<b>Holding-their-own LIPs</b>	<p>The LIP was a fairly active participant, able to respond to judicial questions, cf. the 'umbrella semi-represented'.</p> <p>Action by the judicial officer to protect the LIP, including more extensive signposting of process, attempting to use everyday language and ensuring the LIP had time to have their say.</p>	<p>Typically semi-represented cases in Children Act matters. Relatively simple hearings: directions and interim hearings without cross-examination.</p> <p>LIPs have had previous experience of hearings and know and understand the process, especially turn-taking. May have had recent legal advice. LIP generally able to cooperate with the represented party's lawyer to a degree.</p> <p>LIPs were generally confident, though not over-confident. LIP's contribution in court was focused and to the point. May have McKenzie Friend for moral support.</p> <p>Case example B034. C012 for repeat litigant</p>	<p>Hearings generally effective and efficient though some suggestion that they may take longer to allow for more explanation and signposting.</p> <p>Some evidence that some competent LIPs were involved in repeat or serial litigation. Thus LIPs were able to manage individual hearings competently but burdened the system with repeated litigation. Greater experience may foster competence and/or the relatively supportive approach of the court and absence of a lawyer gatekeeper may fail to dissuade parties from relying on the court to resolve disputes.</p> <p>LIPs reported positive experiences of the court process. Lawyers could raise concerns that the court's attempts to support the LIP went too far and disadvantaged the represented party.</p>

**Table 4.4 ‘Not working’ hearings – apparently ineffective, inefficient and/or unfair**

Type	Description	Essential Features	Evaluation
<b>“Hot potato” hearings</b>	Chaotic hearings where the judge tried and failed to impose order on disruptive LIPs, leading to adjournment or immediate listing for a contested final hearing. Attempts to negotiate pre-hearing were rebuffed in semi-represented cases or not initiated in non-represented cases. Hearings were volatile with frequent interruptions and angry direct exchanges between the parties.	<p>Usually Children Act cases.</p> <p>LIPs had very high levels of conflict with the former partner and may also have had significant substance abuse and/or mental health issues. Cases could be semi-represented or non-represented. Those LIPs were often unable to think beyond their own needs/wants and did not try to conform to the court process. Their worldview and approach was at odds with the court’s expectation of settlement. LIPs may have been unwilling to get representation or have found it difficult to find a lawyer prepared to take them on.</p> <p>In semi-represented cases the lawyer was unable or unwilling to work with the LIP. There were no additional professional supports available to the court.</p> <p>Case examples: E014 drugs/mental health, E010 conflict</p>	Initial hearings were short but ineffective. Attempts to make progress were deferred, with cases adjourned in the hope that the LIP would secure representation or cases set down for a contested hearing. Cases appear efficient in the short-term but were likely to consume considerable court resources in the longer-term.
<b>Over-confident LIPs</b>	Self-confident and extensively-prepared LIPs attempt to conduct their own cases but with limited understanding of procedure and especially of legal relevance. The judicial officer largely treated the case as a fully represented case, adopting a traditional non-	Semi- and non-represented cases, primarily financial. Cases were high conflict, complex and often long-running. LIPs were mistrustful of lawyers and viewed themselves as victims of the system. They were not settlement-oriented. Instead they sought, consciously or otherwise, to win the case by trying to beat lawyers at their own	Highly inefficient. Hearings typically (greatly) exceeded time estimates. Cases typically proceeded to a contested hearing. Enormously costly for any represented party and for the court system as a whole.

	<p>interventionist role though allowing LIPs some leeway regarding process and content. The result was often lengthy rambling hearings where the court was unable to ensure LIP's focus on legally relevant matters. Very extensive but often chaotic paperwork.</p>	<p>game with very extensive prior research and prolonged cross-examination in final hearings.</p> <p>Lawyers appeared to have given up attempting to negotiate or to raise objections to the LIP's approach in court.</p> <p>In non-represented cases, there were no additional professional supports for the judge.</p> <p>Case examples: First hearing C006, final hearing D005.</p>	
<b>Out of their depth LIPs</b>	<p>Longer or additional hearings needed as LIPs were unable to understand what they needed to do either preparing for or during hearings. LIPs may have made major errors in preparation or failed to complete tasks essential for case progression e.g. filing of Form E, organisation of DNA tests, etc. LIPs were unable to present their case effectively, e.g. incapable of grasping how to cross-examine. Judges provided some limited verbal explanations of the process but not enough to enable the LIP to participate effectively. See description of 'vanquished' LIPs at 2.5 above.</p>	<p>Primarily money but also less routine Children Act cases e.g. involving organisation of tests.</p> <p>Directions and final hearings. One or both parties in person. Not high conflict cases.</p> <p>LIPs willing to engage with lawyers but unable to reach agreement. These LIPs were acutely aware of their own limitations in understanding the law and presenting their case.</p> <p>In non-represented cases, there were no additional professional supports for the judge.</p> <p>Case example D025.</p>	<p>Inefficient with longer and/or unnecessary additional hearings. Possibility of unfair outcomes in semi-representation cases. LIPs may well have had a strong case but were unaware of their full legal entitlements and/or unable to present their case competently.</p>
<b>Unprotected LIP(s)</b>	<p>LIPs unable to explore concerns/present case fully though court file suggested</p>	<p>One or both parties in person. Primarily Children Act cases. Directions or review hearings. Cases with child welfare</p>	<p>Efficient but unfair and ongoing risk to</p>

	significant issues to explore. Pressure from judge to reach agreement rather than use court time. See description of 'vanquished' LIPs at 2.5 above.	concerns and/or parties with special needs. Case example C003.	children's safety
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Building on the identification of LIP vulnerabilities and indicators of case complexity in Section 2.5, the researchers were able to draw from the typology of eight hearing types a list of factors that, in combination, appeared to influence success or whether and how LIPs and the court could manage the hearing. This wide range of factors included matter and hearing type, the approach of the judge and any legal representative, the availability of any facilitative third party and the capacity of the LIP(s). It was not just a question of what the court did; features of the case and the LIP were also likely to matter.

These factors are summarised in Table 4.5. Thus, reading down the left column, a low conflict directions hearing with a supportive lawyer and a 'reasonable' LIP (all features of the 'umbrella semi-represented' type) was more likely to run to time and achieve resolution or at least move the case forward. In contrast, a final hearing in a complex money case with an over-confident LIP and non-interventionist judge was much more likely to run considerably over time and require adjudication (typical of an over-confident LIP hearing).

**Table 4.5 Factors associated with hearing 'workability'**

<b>FACTORS MAKING THE HEARING MORE WORKABLE</b>	<b>FACTORS MAKING THE HEARING LESS WORKABLE</b>
<b>Case features:</b>	
Low complexity	More complex
Low conflict	Higher conflict
No/lower risk	Higher/significant risk/safety issues
Children Act	Financial Remedy
Directions hearing	Substantive hearing (FDR or requiring cross-examination)
<b>Professional supports:</b>	
Inquisitorial judicial style	Non-interventionist judicial style
Supportive/approachable opposing lawyer	No lawyer/antagonistic lawyer

Neutral third party (e.g children’s lawyer)	No lawyer/other professional support
<b>LIP characteristics:</b>	
Calm	Volatile (mental health, drug issues)
Settlement-oriented	Litigious, seeking to win
Confident	Over-confident (take lawyers on) or overwhelmed/vulnerable/vanquished
Preparation – some prep	No or very extensive prep
<b>Other supports:</b>	
McKenzie friend <sup>57</sup>	McKenzie friend

Representation type – semi- or non-represented – has not been included as a discrete factor in Table 4.5. Both configurations presented somewhat different challenges to the court: ensuring equality of arms in semi-represented cases and getting something done in non-represented cases. But one was not inherently more difficult than the other, depending upon other factors in the case.

What did appear to be very important in making hearings work was the availability of additional professional support, or more precisely some form of legal professional. Of the four types of ‘working’ hearings in 4.3 above, three were dependent upon additional professional supports for the LIP: the supportive opposing lawyer, the neutral third party lawyer or the inquisitorial judge. Only the ‘holding-their-own LIP’ hearings worked without much additional help for the LIP, but these were relatively simple cases where the LIP had had the benefit of previous legal advice or experience, and the judicial officer was attentive to their needs. Equally, whilst the holding-their-own LIPs were able to get through a short hearing relatively successfully, there were indications that some of these LIPs were repeat litigants. Their impact therefore needs to be viewed over the long rather than the short-term.

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<sup>57</sup> McKenzie Friends are included in both columns to indicate that, in the study, they could play a helpful or unhelpful role. Whilst informal family/friend/third sector MFs were generally very helpful, the involvement of the paid MFs was seen, or reported to be, less straightforwardly positive for the LIP or the court. This is discussed in detail in Sections 5.6 and 6.3 below.

The key question raised by Table 4.5 is whether large numbers of inexperienced LIPs could manage in more complex cases without those additional professional supports.

## 4.5 Challenges to the efficiency and effectiveness of hearings

The report now turns to look in more detail at the specific challenges to efficient and effective hearings involving LIPs. Issues of fairness are considered in section 4.6 below.

The wide array of tasks performed by lawyers was listed in section 4.2 above. Without a lawyer, those tasks had to be picked up by the LIP or as an additional task by another professional. Relying on LIPs to undertake tasks could cause significant delay, partly due to the LIP's lack of understanding and experience, and sometimes due to a lack of emotional detachment from the case. In consequence, sometimes critical tasks were missed out, were done inadequately or were completed by the LIP only with considerable coaching and support from others, particularly judges. Either way, dealing with the LIP case could take more time and effort than a fully represented case. As one judge put it:

The key to dealing with the case is often establishing what the basic facts are and what the issues are ... And if you've just got two litigants in person, you spend the first half hour doing that. If you've got a lawyer, you do it in five minutes. That's the difference. (Court D Judicial focus group 1)

This section explores four areas where LIPs as untrained lay people were procedurally and legally challenged and thus could struggle to put their case clearly and succinctly:

- Preparation/organisational skills
- Knowledge/understanding of law and legal process
- Technical skills, especially how to cross-examine
- Emotional detachment/ability to focus on the legally relevant

### Lack of preparation

Money cases, especially, depended upon effective preparation and full and prompt disclosure. However, few if any LIP cases managed to achieve this. In the observed hearings it was common to have chaotic and incomplete bundles, evidence sprung on the court (and other party) in the hearing or simply no evidence at all. Even where the LIP had been given a bundle, they did not necessarily bring it to court. Delay inevitably ensued. Judges often set aside extended reading time pre-hearing to make sense of the case in advance. Or the hearing took longer as the court ploughed through the material. Or there were adjournments while a LIP and opposing lawyer tried to agree what was admissible. Case C023 was fairly

typical: the husband's non-disclosure had caused multiple previous hearings and adjournments; the researchers observed what was intended to be the final hearing but the husband had again failed to file Form E, so after 36 minutes to discuss what was required the case was listed once again for an FDR.

### **Knowledge/understanding of law and legal process**

The standard court process, described in section 4.2 does not include time for extended introductions or ground rules or explanations about who should speak when, etc. All that is taken as a given. Lawyers have had years of training and experience. The represented parties will have been briefed and debriefed by their lawyers. Where there were one or two LIPs, the judge had to offer far more signposting and explanation at the start, during and at the end of the hearing. Some did far more than others, but it all took court time.

Similarly, no time was usually allocated in hearings to check that participants understood the outcome and what they had to do next. Where there was a LIP, some judges did go through the next steps and may ask if the LIPs understood what they have to do. Again, this could take time if done fully. However, brief technical explanations, the pressure of the situation and a reluctance to admit to a lack of understanding meant that some LIPs left court not at all clear about what to do next. In Case E018, for example, the two LIPs had failed to grasp at the first hearing that they were responsible for organising DNA tests. Two additional hearings were required to rectify the misunderstanding.

### **Technical competence**

There were some 'legal' tasks that LIPs simply could not perform effectively, if at all. The most important was cross-examination. The researchers found that LIPs were either unable to formulate questions or unable to focus on the legally relevant. The team observed several cases of long, rambling and unproductive cross-examination in 'half day' cases then running into their third or fourth day. This was not a matter of lack of intelligence, just legal nous.<sup>58</sup> As a judge noted:

...she [LIP] may be, you know, reasonably intelligent and have asked a huge number of questions. Now, whether it actually goes, you know, she's just sort of slightly missed the point in each one in a way, or she's got the point in some but she hasn't quite got it ... or she's gone off on a complete, you know, sort of red herring or gone up a cul-de-sac or whatever, because she's focussed on

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<sup>58</sup> And see Section 2.5 for the distinction between educational qualifications and legal and technical competence.

something that you know is not actually going to get her anywhere (Court A  
Judicial focus group 1)

Alternatively, judges would either take over cross-examination, often necessitating considerable pre-hearing preparation, or else try to coach the LIP through the process. This also took time and raised issues of fairness that are considered below.

One task that was never delegated to LIPs was drafting court orders. It was accepted in all courts that the two lawyers would normally draft the order and then hand it in to the court for checking. In LIP cases, the task fell to any lawyer in the case (whether representing the applicant, the respondent or the children), or even a Cafcass officer might be asked as a favour. Otherwise the task fell to the judge. Judges reported that it could take about 5-20 minutes to draft a straightforward order or up to an hour for something more complex. Drafting was often done over lunch or, in some courts, judges and court staff noted in focus groups that non-represented cases were allocated longer slots to allow drafting time. This, of course, reduced the number of cases that could be heard in a list.

Some judges also noted that they were having to draft much more detailed orders in LIP cases so that the LIP had a detailed plan, but that extra detail itself took more time:

I have noticed in these directions appointments, generally speaking litigants in person don't attend my court with pen and paper. That means that my orders are much more detailed than I would ordinarily do if there are two solicitors taking notes who would know how to read an order anyway. That actually takes time... I'm finding that my orders are twice as long, far more detailed than they would ordinarily be, and that is a way that I'm trying to deal with anything that is missing... There's a snowball consequence of everything extra that needs to be done.... (Court C Judicial focus group)

### **Conflict, emotion and legal relevance**

In Chapter 3 it was noted that many LIP cases were not filtered or screened by lawyers to ensure that they have legal merit and to frame them in legal terms. Both lack of framing and reluctance to engage in waiting room negotiations mean that the court had to spend time dealing with issues that would normally have been dealt with earlier or not raised at all:

... this morning this person who took up over two hours on an issue making a drug allegation with absolutely no foundation to it but he wanted to have his say and then he wanted to force his say and Cafcass have to have three separate meetings with him. (Lawyer focus group, Court E)

It was also difficult for LIPs as lay people to understand what was legally relevant. Issues of great personal significance were not necessarily significant in law. The challenge for the judge was to find what was relevant amongst a mass of other written and oral material offered by the LIP. This might mean additional pre-hearing reading for the judge. In the hearing itself, it might mean a long presentation by the LIP rather than a succinct case summary:

They'll tell you everything in case it might be relevant and you don't want to shut them up in case they might come on to a relevant point. But you've got to, eventually. And it's very difficult to be able to get them to be focused on what's relevant. They just don't know what's going to be relevant. (Court A Judicial focus group)

Quarrels between unrepresented parties in court could also take time. In fully represented cases, the lawyers acted as a buffer between the parties and between their client and the court. Strict rules about turn-taking and addressing everything to the judge rather than direct talk between the parties also minimised the potential for conflict. However, the court observations showed that LIPs were not necessarily aware of these rules and often engaged in direct talk, and argument, with each other. In the absence of lawyers to provide a buffer, the judge had to adopt a policing role, not just to ensure legal relevance but also to maintain order:

It's quite difficult, I find, to get them to not squabble in front of me and to listen to what I've got to say rather than shout at each other and interrupt ... [they] don't sort of have any kind of boundaries, in a way .... Even quite middle class people. (Court D Judicial focus group 1)

In some cases (the 'hot potatoes' in Table 4.4), containment of the conflict or volatile behaviour was not possible and the researchers observed that judges found it easier to defer decision-making, adjourning to a later date when the parties might have secured representation.

## 4.6 Challenges to fairness

The right to a fair trial is enshrined in law. The challenge for the courts is to ensure a fair process where one or both parties is an untrained lay person. This section explores four issues that make ensuring equality of arms more difficult:

- a LIP who is unaware of their legal entitlements and/or unable to do justice to their case

- consistency in levels of support between cases
- supporting a LIP whilst being fair to the represented party
- particularly vulnerable parties

### **Lack of knowledge of entitlements**

The adversarial process is predicated on the notion that parties are aware of their legal entitlements (or more broadly endowments) and have the capacity to argue their case in front of a neutral arbiter who will then choose the stronger case. This system falls down when parties lack that awareness. In the sample there were several (primarily money) cases where it was clear to all observers, including the judge and any opposing lawyer, that LIPs were unaware of their legal entitlements. This was an uncomfortable position for lawyers and judges as neither is permitted to give the LIP legal advice. In case E016, for example, the unrepresented wife was unaware that her represented husband was potentially liable for financial support for her older children whom he, as the non-biological father, had previously treated as ‘children of the family’. The judge was painfully aware of the wife’s potential claim but could only suggest that the wife sought legal advice:

The law does provide that children of the family, children who are taken on by the new partner, under s41 of the Matrimonial Causes Act, the non-biological parent can have a liability for them.... But you are in person and you don’t know the law. Think about getting advice?

The wife was on a very low income, however, and simply could not afford to get the legal advice recommended. It was therefore unlikely that she would make the claim.

### **Inability to do justice to their case**

A LIP’s inability to run a case could cause not just delay but also issues of real unfairness where a LIP with a reasonable case was simply unable to press it.<sup>59</sup> Again, cross-examination was particularly problematic. LIPs were not necessarily able to test expert evidence. When confronted with a report they might ask multiple unfocused questions or be unable to articulate why it should be challenged:

“Why don’t you agree with it?”, “Well, it’s just wrong”, “Well, why is it wrong?”, “Because it is”. (Court D, Judicial focus group 2).

Even with considerable help from the judge, some LIPs were unable to understand the purpose of cross-examination, to formulate questions or sustain a line of questioning. This is

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<sup>59</sup> See also Section 2.5 above for discussion of competence and capacity.

evident in this extract from field notes where the LIP was unable to advance his case for contact with his child:

Judge: Mr X, you can ask questions of [applicant] ...

*LIP: makes a statement about what he wants to happen with the children.*

Judge: that's several issues you've raised. You need to ask one question at a time.

LIP: What would you feel about me getting custody of the children [at a later date]?

Represented applicant: I'd have to go with what [social services] say at the time.

LIP [to judge]: That's it.

Judge: Not quite – you talked about contact and then custody. Ask about contact first. I'll ask if you like and if I haven't asked it right, you can correct me. *Frames a question about contact at a later date.*

*Represented applicant responds to judge.*

Judge [to LIP]: Are you asking about contact now?

LIP: That's not a matter for [this witness].

*Judge explains why it is relevant.* [Asks LIP]: Have you seen the children in the past year?

LIP: No.

Judge [to witness]: What would be your view about the children seeing their father [at present]?

*Represented applicant responds saying doesn't think it's in their best interest right now.... Thinks it needs to be a gradual process.*

Judge: [to LIP] Any other questions?

LIP: No. Not that I can think of.... (Case D016, observation notes)

That LIP was not interviewed. Other LIPs observed were very keenly aware of how poorly they had performed and thought that they had never stood a chance as an amateur against a professional.

### **Inconsistency in supporting LIPs**

Judges were generally aware of the difficulties LIPs faced in court and some took some steps to attempt to redress the balance. The researchers noted, however, wide inconsistencies between judges and between cases in the support that LIPs might get. This variation is a further source of possible unfairness. The range of support adopted by judges is most evident in the assistance given in relation to cross-examination, the most challenging task for LIPs. Approaches adopted by judges included:



- **Sink or swim.** LIP treated as if they were a trained lawyer. No prior advice and no assistance with formulating questions or focusing on the legally relevant. LIP could be rebuked for making statements rather than formulating questions and straying off topic (case example E025).
- **Steer towards particular topics.** Judge gives some guidance to the LIP about what topics the LIP should address, e.g. judge to LIP husband: “Mr X, if you think the land registration system is different in [foreign country] to here, you must question Mrs X about this” (B060).
- **This is the question you should ask** – The judge offers guidance on topic to explore and also formulates questions for the LIP to deliver (see case D016 above).
- **I’ll devise and deliver the questions.** The judge takes over cross-examination completely using a fully inquisitorial approach. For example in B063 the judge did a detailed Q&A interrogation with the LIP wife then the LIP husband, invited any further questions and then gave judgment. Some semi-represented hearings were a hybrid adversarial-inquisitorial process with the applicant lawyer running their client’s case before the judge in effect ran the LIP’s case (e.g. E008).

The inconsistency of support has been identified in earlier studies (e.g. Moorhead and Sefton 2005: 259-61).

### Fairness to the represented party

Judges also have to be fair to the represented party. Striking the balance can be very difficult. The great support given to LIPs by the inquisitorial approach was seen as appropriate by some lawyers. In the E008 case, for example, the lawyer commented, “who better to ask the questions if [the judge] thinks (s)he needs to know them herself or himself?” Other lawyers, however, thought that the additional help tilted the balance unfairly in favour of the LIP, specifically that judges were giving LIPs their case to the detriment of the represented client:

When [LIPs] don’t hit the issues that the judge thinks they ought to be hitting the judge will take over at the end and say “I have some additional questions that I would like to ask”. And then your client feels like the judge is against them because they have almost been forced to reveal the weaknesses in their case by the judge and the judge hasn’t done the same exercise when the other party has been on the stand. (Court E, lawyer focus group)

Lawyers also reported being unable to object to some of the questions that the judge put, even if they felt they were inappropriate. More generally, some lawyers were highly critical of judges for allowing LIPs significant leeway for procedural failings, not just in cross-examination, but throughout the process, for example, in failing to disclose information.

Aside from procedural fairness, in semi-represented cases many lawyers reported that their clients carried a disproportionate financial burden as the sole lawyer in the case was given responsibility for administrative work such as preparing bundles.<sup>60</sup> Lawyers also noted the potential unfairness of their client paying for representation while in effect the judicial support offered representation for free:

I think we all feel the unfairness of the position. You know your client's paying for us and we've prepared, spend time and then the client's got to be thinking well why do I do that, because the judge has done it for the other side. (Court B, lawyer focus group)

### **Abuse by former partners/failure to protect**

One of the advantages of representation is that it protects vulnerable parties. In several cases, the researcher observed that the LIP appeared to have been pressured into an agreement where a competent lawyer would have been able to make a powerful case based on the worrying evidence that the researchers found in the court file.<sup>61</sup> In Case C003, for example, the represented father insulted and shouted at the unrepresented mother throughout the hearing, the mother gaining little protection from the Legal Advisor. The outcome of the hearing was a staged move towards unsupervised contact, despite the father's well documented history of heroin use, a restraining order and the father's behaviour in court.

The research team were told about, though did not observe, cases where a former partner used cross-examination to perpetuate abuse against a vulnerable former partner. Some judges refused to permit cross-examination in those circumstances or insisted that questions be asked through them rather than directly to the former partner. More commonly, the researchers witnessed deeply unpleasant and painful cross-examination by former partners where the process became a form of ritualised public argument (e.g. E025).

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<sup>60</sup> Some lawyers also suggested that some LIPs sent numerous letters and emails to the represented party's lawyer knowing that they would have to be read and responded to and therefore would increase their former partner's legal bill (e.g. B034 solicitor and counsel).

<sup>61</sup> See also 2.5 above.

## 4.7 Summary

The court system is based on an adversarial, full representation model with two lawyers presenting their client's cases to an impartial arbiter – the judge – who will make a decision. The role of the lawyers is central.

Hearings where both parties were represented were generally patterned, predictable and efficient. All participants understood their roles without any need for explanation or behaviour management.

LIP hearings were far less standardised. There was considerable variation in who picked up the tasks that a lawyer would normally perform in their absence – whether it was a LIP, the judge, the lawyer for the represented party or nobody. There was also variation in how effectively those tasks were done.

The data suggested that semi-represented cases had longer final hearings and required more hearings than fully represented and non-represented cases. Cases with a LIP were more likely to require adjudication or be withdrawn or dismissed. Secondary analysis of a dataset of financial remedy contested hearings also suggested that LIP cases were less likely to settle and less likely to settle early than fully represented cases.

There was variation in how well LIP hearings appear to work or not work in court. Four types appeared relatively fair and efficient/effective: *umbrella semi* – the represented party's lawyer works on behalf of both parties; *third party (quasi) lawyer* – the children's lawyer acts as broker for both LIPs; *fully inquisitorial judge* – the judge takes on the role of lawyer(s) and judge *holding-their-own LIPs* – a competent LIP manages a simple hearing with support from the judge.

Four types of hearing appeared inefficient/ineffective or unfair: *"hot potato" hearings* - chaotic hearings with disruptive LIPs, adjourned or listed for contested hearings; *over-confident LIPs* - rambling hearings unable to restrict LIPs to legally relevant matters; *out of their depth LIPs* – LIPs unable to understand/accomplish tasks resulting in longer or extra hearings and *unprotected LIPs* - LIPs unable to explore concerns/present case.

A combination of factors appears to influence how well courts and LIPs cope. These include matter and hearing type (directions vs. substantive hearing), the approach of the judge and any legal representative, the availability of any facilitative third party and the capacity of the LIP(s). The availability of additional professional (legal) support for the LIP was often key to

success. Three of the four types of 'working' hearings involved either a supportive lawyer or an activist/inquisitorial judge.

Causes of delay included LIPs' lack of understanding and experience meaning sometimes critical tasks were missed out, were done inadequately or were completed by the LIP only with considerable coaching and support from others, particularly judges.

Ensuring equality of arms between parties was a real challenge, notably when a LIP was unaware of their legal entitlements and/or unable to do justice to their case. Judges varied considerably in the extent to which they helped LIPs, in itself a source of potential unfairness. Judicial attempts to support LIPs could be seen as unfair to represented parties in semi-representation cases.

Two key 'legal' tasks - the preparation of bundles and cross-examination - were beyond the capacity of most LIPs unless they had considerable help.

## 5. The Support Needs of Litigants in Person

### 5.1 Introduction

It should be clear from earlier chapters that the courts and family justice professionals did make some attempts to support LIPs where they could. This support could sometimes be substantial though taking more court or judicial time as a result, as described in the previous chapter. More commonly the nature of this support was limited to minor procedural adaptations. The support available was also inconsistent between courts and between judges. As described in the previous chapter some LIPs were treated as if they were lawyers with little quarter given, whilst others were given considerable leeway and assistance. This chapter explores the support needs of LIPs in more detail. It begins with how LIPs experience self-representation and some of the factors that can shape that experience. The chapter then describes the four main types of support that LIPs identify that they need and then how LIPs tried to help themselves through support-seeking strategies. The second half of the chapter evaluates the adequacy of the different types of support accessed.

#### Key messages:

- The LIP experience was mixed, sometimes better than expected but often stressful and confusing.
- The main support needs were for information about process and procedure, emotional support, practical support and tailored legal advice.
- LIPs varied enormously in terms both of willingness and ability to seek support and of the effectiveness with which support is sought.
- LIPs did not necessarily know what their support needs were or what support was available. Effective and consistent signposting of appropriate sources of support was as important as putting the support in place.
- The support available was disparate, variable and limited. Generic process information was most available, tailored legal advice least available.
- Family, friends and third sector support workers could be very helpful acting as informal supporters but the development of paid 'professional' McKenzie Friends was a source of real concern.

### 5.2 LIP expectations and LIP experiences

Many LIPs found it quite difficult to state what their expectations had been before going to court. A common response was simply that they had not had any expectations:

I don't really know what we were expecting. Do you? [addressed to his wife]  
(A012 paternal grandfather applicant)

This reported lack of any expectations may reflect a lack of preparation that was fairly common amongst LIPs (see section 5.4 below), or it may simply stem from LIPs feeling out of their depth and not understanding the process. This was evident in the following quotation from a LIP who had felt very disadvantaged by the court process:

I went into that court absolutely blind – absolutely completely and utterly blind – didn't know what to expect, what to say, what I could say, what I couldn't say, what to take with me. (D025 LIP husband)

Where LIPs were able to identify prior expectations these were primarily that the court process would be more formal (and intimidating) than they actually experienced:

I was expecting it to be more formal than it was, so that was certainly a benefit, because it immediately put me at ease. (C012 LIP father)

I just expected a harder [judge] to speak to, you know... Serious, serious, yeah. Like in the movies. (D014 LIP wife)

As these quotations indicate, the experience of being a LIP was variable. The very different representation experiences, capabilities and vulnerabilities of LIPs and the widely varying complexity of their cases were outlined in Chapter 2. As shown in Chapters 3 and 4, the response of the courts varied also. Some courts had more support available onsite than others. Some judges were very proactive in adapting the process for LIPs whilst others expected LIPs to adapt themselves to the legal process.

Despite this variation, a common message from the interviews with LIPs was that going to court as a litigant in person was a difficult experience, as other studies have found (Dewar et al. 2000; Williams 2011; Macfarlane 2013). Whilst going to court was not as bad as some people feared or expected, most LIPs still described it as tough. There were four main aspects to this:

1. *Fear and anxiety.* Going to court as a litigant was generally acknowledged to be highly stressful. The court system is designed to instil respect, but it may sometimes have the

unintended effect of inducing fear. The stakes were high. The prospect of coming face to face with the ex-partner could also be very upsetting if not overwhelming. Even represented parties reported feeling intimidated going to court. LIPs had to deal with this stressful experience by themselves:

I do get a bit worried as well that something is going to happen and I don't understand what is going on. Because this is about my child. It's not like it's about a property or something like that ... It's intimidating and it's worrying as well that you are going to get something wrong because you haven't got someone else there to help you out, just to have your back [covered] as well. (E018 LIP mother)

It's just worrying coming to court for anyone I think. You are sitting there with a dry mouth and there is all sorts going on and it's just confusing. (C002 LIP father)

*2. Bewilderment and confusion.* Many LIPs found great difficulty in understanding fully what was going on in their case, adding to their stress. Some LIPs were confused from start to finish, others had managed to achieve a reasonable grasp of the overall process but were defeated by some of the technicalities, as the interviews and observations revealed. Even where the process was less intimidating than had been expected, it could still be very hard to understand:

[I was] expecting loads of people there looking at me and asking loads of questions and I would be tongue-tied. That's what I thought it would be like.... It's not as scary as you think it would be. It's not as bad as I thought it would be but it's just a bit confusing 'cos like... it's just confusing. (B035 LIP Mother).

Sometimes the level of confusion was linked to levels of education:

'I'm not really a nervous person normally, but obviously I did find myself shaking, tell you the truth... 'cos [sic] let's be honest, I've got no real education... there's some things I don't understand technically. (A029)

But as noted in section 2.5 above, even LIPs with a university education found it difficult to understand the whole process. In the following extract, a university-educated LIP reports that he had not been able to present his case fully as he had not known when he could interject or interrupt. His comments highlight his lack of understanding of the turn-taking rules of hearings and the failure of the court to explain those to him:

It's difficult when you are representing yourself to know when to interject, when to almost interrupt. So I think the first part of the conversation or the meeting [sic]

today was largely between erm... the applicant's solicitor and the judge and I felt... I wasn't confident enough to interject ... I am kind of waiting for a gap in the conversation which doesn't occur erm... then I think by the time I am wanting to interject the hearing has gone onto another subject and I have missed my opportunity. (A015 LIP applicant husband)

3. *Marginalisation*. Some LIPs also felt marginalised or belittled by the process. This was particularly so in semi-represented cases where LIPs could feel that they were the outsiders. There is a hint of this in the A015 case above. Other LIPs also reported feeling that they were ignored by the judge who focused only on the opposing lawyer:

Awful, it's absolutely horrible... I have been in there both with a solicitor and by myself and the judge doesn't even look at you. He doesn't ask anything at all. He will sit there and apply everything to the other party's solicitor ... you just feel like a chess piece. (E016 LIP respondent wife)

4. *Time-consuming and slow*. Some LIPs also experienced the court process as time-consuming and very slow. This could apply equally to the preparation required before each hearing and also the waiting around at court itself:

...the hearing today has said there is more documentation to prepare and we have got to wait another two months, so it's another two months of anxiousness and nervousness and not knowing if we have done the right thing or if it's going to be okay and it is going to be very hard to get on with day to day life when I am worrying about how to do that you know. (E006)

Not all LIPs reported negative experiences or they reported that the experience had been better than they had feared. Several factors seem to underpin the more positive experiences:

1. The approach of the judge or opposing solicitor was very important. Some judges were better than others at explaining to the LIP what was going on and what needed to be done, rendering the process more understandable and therefore less overwhelming. Opposing lawyers could also be very helpful in keeping the LIP informed, most notably in the '*umbrella semi-represented*' cases described in Chapter 4:

Scary, not having anybody to talk to but the [ex partner's] solicitor has been really helpful. She has been keeping me up to date with what is happening in the next ten or fifteen minutes or next ten seconds and stuff. (A003 LIP respondent mother)



Equally some judges enabled LIPs to contribute meaningfully rather than marginalising them:

It's not as bad as what I thought it would be erm... Like when you say 'court' it sounds really intimidating but today, when you ask somebody like that [legal adviser] and she was really nice... But when I have been in there before and there was a man in there he wouldn't let me ask any questions or speak and all he did was listen to the solicitor. (C003 LIP respondent mother)

2. Many LIPs cited their previous experience being represented in court as critical. Those who had prior court experience, whether from an earlier hearing or previous proceedings, emphasised how helpful it was to have clearer expectations and understanding of what would be likely to happen on the day:

Um, kind of prepared, because obviously I've been before. So I know sort of what to expect. So I wasn't really surprised. (A019 LIP mother)

I've been in the situation many times before, so I'm sort of familiar with the process now. So yeah, I suppose it's not as daunting as I thought it would be, but still not very nice at the same time. (A016 Husband in financial remedy case with previous Children Act proceedings)

3. LIPs with a reasonable degree of self-belief and self-confidence also tended to report more positive, or fewer negative, experiences. Some LIPs reported being able to transfer skills, such as conflict management, from their existing jobs to the court situation. As noted in Chapters 2 and 4, however, some LIPs could be over-confident and were less able to identify or appreciate their own limitations. Some LIPs, for example, reported having a good grasp of proceedings but their positive appraisal did not correspond with reality:

The paperwork the court provides for you to fill in is reasonably self-explanatory to the educated ... and I'm having to use this word for myself, not be pompous, but the court system is there to help as you go along. (A009 applicant husband LIP) (The researcher notes that the LIP's paperwork was poorly completed. He also seemed unaware that he would have been eligible to apply for legal aid and fee remission.)

The lesson here is that LIPs might well lack insight into their behaviour and performance and their reported support needs should not always be taken at face value.<sup>62</sup> Inability to gauge when more help might be needed might deter LIPs from proactively seeking advice and underscores the need for outreach support to be put in place. Outreach support could involve court staff routinely sending information about sources of support to all LIPs, or it could involve local providers of support making efforts to engage LIPs at court, or by post or telephone. Cafcass, lawyers, court staff and judges could also be encouraged to formally refer LIPs to any locally available support service.

### 5.3 What LIPs want or need

Although LIPs cannot be expected to know exactly what support they need to participate effectively in the court process, those interviewed were asked what, if anything, might have assisted their case. Most responses fell into four categories.

#### Process and procedural information

Almost every LIP interviewed expressed some desire for more information about the court process. The type of information wanted included: clear guidelines about selecting, accessing and completing forms; detail on what happens at each stage of the court process; information on court etiquette, e.g. how to address the judge, when to speak and the rules of cross examination; templates for completing statements and other paperwork. LIPs suggested varying ways in which information of this type could be provided, including written information packs sent to them at the beginning of proceedings as well as YouTube videos and websites, and information playing on screens in court waiting areas. Many, however, clearly wanted an opportunity for face-to-face advice:

Well I, personally, like the public counter at the court so I can go there and ask pertinent questions ... it's alright doing things on the internet, filling forms on the internet, but sometimes it's easier to speak to the horse's mouth. They don't advise anything and let's get that on record, but they do point you in the right direction. (A009 applicant LIP)

#### Practical help

LIPs also would like practical help, particularly with paperwork. In some courts there were facilities, for example, to make copies of key documents.

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<sup>62</sup> See the description of 'Over-confident' LIPs in Chapter 4.

## Emotional/moral support

It was noted above that many LIPs found the court experience to be very daunting, particularly the first time. Not surprisingly some form of emotional or moral support was seen as a high priority. In some instances, LIPs reported that family court professionals could provide some brief support and reassurance. Pre-hearing phone calls or meetings at court with Cafcass officers could be a very useful way of getting some reassurance. The researchers also observed many small acts of kindness from court ushers to LIPs who were visibly distressed. For many LIPs though it was really important to have their own supporter with them at court to prevent them feeling isolated and out of their depth, much as a lawyer provides partisan support to represented parties. This informal support from a friend, family member, a volunteer helper or McKenzie Friend was seen as invaluable.

*So how were you feeling when you got to the front door [of the court?]*

A bit sick really, just not knowing ... Just not knowing what I was doing really. Do you know what I mean? [Ex-partner's] got a solicitor and that, and I'm on my own.

*And what was it like having your friend [as informal supporter] in there? ...*

It was much better. (E009 respondent mother)

## Tailored legal advice

Many LIPs also wanted individual advice about what to do in their case. This could include broad questions including what their entitlements were and what was reasonable. It also included specific questions such as what they should put in their statements. Some LIPs had tried to answer these questions by doing research online but they were unable to get the individual advice about their legal entitlements they needed (see also Denvir et al. 2011). This was particularly true for financial cases where generic advice may be less helpful and potentially inaccurate, as these two case studies illustrate:

Respondent mother made many efforts to get unbundled legal advice, none of which was successful. She paid £450 for a 'divorce lite' package from one firm. The trainee solicitor she was assigned was not qualified to deal with the complexities of the case. The same problem arose during appointments at the CAB and during a telephone call to the Wikivorce helpline. (Case E016)

Respondent husband went to CAB who told him he should get legal advice. He did internet research but could only find information about the USA. He called a 'free' legal advice helpline and was not told they began charging after five minutes and received a bill for £128. (C002)

Unsurprisingly, many LIPs simply wanted access to a lawyer, either for legal advice about their case and/or to represent them in court.

## 5.4 Support-seeking strategies

LIPs have a range of needs and the study indicated that the courts currently offer limited support to meet those needs. Bridging the gap therefore requires the LIPs to take action to address those needs for information, support and advice. However, there was considerable diversity in both the willingness and ability of LIPs to meet their own needs. In this section three different approaches to support seeking behaviour exhibited by the LIPs are described – proactive, reactive and passive. Of course, this presumes that there is adequate support available if searched for effectively. This issue is considered in section 5.5 below.

### Proactive approaches

Proactive LIPs were those who searched for information and support before and/or during the court process without any prompting by the court. They had decided for themselves that they had to be ready for proceedings and set out to get the help they needed. Based on the interviews with LIPs and relevant information gleaned from case files, it appears that proactive LIPs were just as likely to be respondents as applicants in this sample. However, from the interview data, the proactive LIPs appeared to be in a minority in this sample.

Furthermore, motivation to search was only one aspect of an effective search for information. LIPs also needed to have the organisation skills and ability to undertake a systematic or effective search. Based on analysis of interviews with LIPs, the proactive LIPs could be subdivided into two types:

*Capable/organised*: undertaking a relatively systematic search for appropriate material and producing at least some relevant information from multiple sources, as these two case studies highlight:

Upon realising that obtaining unbundled legal advice would be too expensive, the respondent husband accessed a range of websites to get information related to divorce and purchased a book on DIY divorce. His new wife had a law degree and was able to assist in searching for relevant cases. (A015)

Respondent mother had legal advice but was saving money by appearing in person at court. She found out the rules relating to McKenzie Friends through Internet research and also visited sites such as Resolution and Gingerbread

which gave her information about legal principles and putting children first. She read documents about the legal process and tried (unsuccessfully) to find a YouTube video of a court environment. (D024)

*Scattergun/shot in the dark approach:* a less organised and systematic approach to help-seeking, with a focus on whatever leads presented themselves. This could include extensive direct correspondence with the family justice professionals involved in the case:

Both parties in this non-represented case correspond extensively with the court, including by sending direct emails to the district judge, the appointed guardian and the child's solicitor, partly to influence the speed and trajectory of the case and to obtain information about what they should or could do next. (A008)

Yet motivation and good organisation were not always enough to secure adequate information. In some instances the information needs of the LIP were such that there were no easily available sources in spite of their best efforts. Two cases of 'frustrated searchers' – E016, C002 – were described above. The LIP in those cases had done extensive online and local searches but had not been able to get the individually tailored information that they needed to conduct their case. In both cases what the LIP needed was legal advice about their individual entitlements and therefore how to press their case. That information was simply not available except from a lawyer. Neither party could afford to pay.

There were also questions about how useful or adequate an information search would prove to be once LIPs entered the court arena. It is instructive that the LIPs in both A015 and D024, the two proactive organised searchers described above, were both wrong-footed in court when their cases did not go as had been expected. In A015 the LIP had thought that the hearing would not involve cross-examination and so was entirely unprepared when he was required to cross examine and thought that he had been disadvantaged as a result. In D024 the Cafcass safeguarding checks that the LIP mother had been intending to rely on were not available and the LIP was at a loss as to how to react, what to say or what to ask for instead.

### **Reactive approaches**

Reactive LIPs did not try to manage the trajectory of their case but did respond to instructions or suggestions from judges, solicitors, court staff or Cafcass in the course of proceedings. Most of the observed cases in this sample fell in the 'reactive' category. This could in part be a manifestation and consequence of what is already known to be the

widespread perception of family disputes as 'legal',<sup>63</sup> if litigants could not access a lawyer, they assumed they were on their own and lacked the imagination to conceive of alternative sources of support.

The ability of the reactive LIPs to respond effectively depended at least in part on the comprehensiveness and clarity of the instructions or signposting the LIPs were given. As seen in Chapter 4, courts could assume that LIPs understood more than they did (sometimes because a nervous LIP said that they had understood when in fact they had not). The researchers observed more than one example where the LIP(s) were given the same very limited instructions that would be given to experienced lawyers. Only after (and if) it became apparent that the LIP had not understood fully would more detailed instructions be given:

My last statement was 44 pages long, which was kind of laughed at... [I now know] the statement should only be two to three pages. ... We were just instructed to make a statement for the court, erm, and that was left at that. (A008 applicant LIP)

### Passive approaches

A fairly sizeable number of LIPs sought no additional help and did no research at all, whether self-initiated or prompted by the court. LIPs could be passive for a number of reasons. Some LIPs simply did not appear to contemplate that they could or should do any research. Instead they just turned up at court entirely unprepared. This might stem from a lack of self-efficacy in this particular situation, i.e. the LIP feeling so out of their depth that they do not know where to begin or that there is little point even trying. Or it may simply reflect a more general passive approach to life challenges amongst these individuals.

Nor, even in a digital age, was everyone computer literate or able to access IT facilities. The following exchange with a McKenzie Friend who had done no preparation at all to support his friend was by no means untypical of many LIPs:

*Interviewer asks if MF had done any research, including internet searches.*  
No. Solely suck it and see... I am not computer literate so... possibly if I was maybe I would have gone online and genned up on it but as I say I am not computer literate so that don't apply.

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<sup>63</sup> It has been found that individuals with private family law problems are more likely to consult a lawyer than those experiencing many other justiciable problems (Genn 1999; Vanilla Research 2012).

(Court usher had told the respondent husband, for whom English was a second language, that he could bring someone as a McKenzie Friend. They did not bring paperwork or bundles to the final hearing and had not complied properly with instructions to complete Form E or make full disclosure.) (B060)

Some passive LIPs may well have had the capacity to find information but had chosen not to do so. These 'ostrich LIPs' did no research but also failed to engage with the court process. As noted in Section 2.6 above, in some cases this could be a delaying tactic or it could simply reflect a wish that the proceedings would go away.

There was also a group of LIPs with drug/alcohol/mental health issues whose fairly chaotic lifestyles were inimical to any form of support-seeking behaviour (see Chapters 2 and 4). Some of these LIPs had not been able to secure or retain legal representation despite legal aid eligibility. It is not surprising therefore that they did not seek alternative sources of help and support. Their volatility and lack of understanding of the court process made it difficult for the court to manage their cases.

## 5.5 What LIPs get: evaluation of available support

It is clear from the data that the services available to support LIPs were at a very early stage of development and there were major issues of availability, accuracy, clarity and relevance. This section begins by looking at sources for information and advice, and then considers emotional and practical support before examining the role of McKenzie Friends.

### Advice needs: process information and case advice

The Internet was a popular choice for LIPs who had tried to obtain general advice about process or, for some, information or advice relevant to their case. The internet has a lot of potential for informing LIPs, as well as some serious drawbacks in relation to relevance and accuracy. Few LIPs reported using the HMCTS/MoJ websites. Those few who did so reported that they were not useful for them as LIPs. For example one LIP reported that it was not helpful given its orientation only to lawyers, not LIPs:

*And what about sort of government or courts, official websites ... have you used any of those?*

Yes, the Ministry of Justice one.

*Yeah, any use to you?*

No. No, not at all really. Um ... it's not tailored for people representing themselves. There isn't anything that kind of says 'Are you representing yourself?' (D018 LIP applicant father)

The DWP Sorting out Separation site was not mentioned by any LIPs. Only two professionals were aware of it and one of those was critical of it:

I'm not overly impressed with it to be fair... what I was trying to do yesterday in fact was Google information on separating parents to say what would you get if you were a service user Googling it and see. And you get quite a number of sites that actually were inaccurate, quite a lot of sites that have been written by somebody who's been served an injustice by the system. And this one didn't even come up – Sorting Out Separation did not come up at all. (Cafcass interview Court A)

In the absence of an authoritative, LIP-friendly website, LIPs were left to hunt for information on a wide range of sites where it was very difficult for them to gauge the quality, accuracy and relevance of information. Some reported positive experiences with some sites, such as Wikivorce, although others found the same site far less helpful (e.g. E016). Others noted that much information, including on discussion fora, was posted from individuals or groups with a particular agenda that was not necessarily helpful in their case:

But they're all for the dads aren't they so that you have to just get on with it.  
(A010)

A lot of rights for fathers came up. (A022)

Not surprisingly LIPs also found it difficult to appraise the relevance and quality of information. Lawyers pointed out cases where a LIP had got information from the internet and insisted that it was applicable in their case, including cases where the information was from another jurisdiction (C027, and see Denvir et al. 2011).

Some LIPs got into difficulty being charged to use online services that they thought were free (C022).

There were also significant issues with accessibility. There remains a real digital divide. Whilst some LIPs spent much of their working lives online, others never used the internet. There was some regional variation. At Court C only two LIPs reported having used the



internet. Given the demographic profile of the area, this was likely to be attributable to a combination of lack of access and lack of digital literacy. Despite this the court staff at Court C took the view that the internet should be the primary source of information for LIPs, suggesting that any LIP could 'visit the public library' to get access. A LIP in the study reported however, that it was not possible to do extensive research online at a public library. Aside from privacy issues, LIPs faced logistical constraints in trying to access library computers:

I don't have internet access at home... and yes it would be nice to think I could just go down the library and use the internet down there. In reality it doesn't happen if you are a busy mother with three kids...It turns into a whole logistic nightmare where you have to pack everybody up and then the six year old isn't going to sit still in the library because he's going to distract you and even in the days when you think you have time it's a short space of time between nine and three and you have already cut two hours off either side [for bus travel to the library]. (E016 LIP applicant wife)

Getting access to adequate, high quality information about the court process was challenging enough but evidence from interviews with LIPs and all the professional groups was that getting access to individual case advice was even more difficult. The problem is that very few agencies were in a position to give individual case advice even though for many LIPs it was the most pressing need. This could be very frustrating for LIPs who had no alternative means to get individual advice and could not afford a lawyer.

Citizens Advice Bureaux (CABx) were probably the most widely signposted and most frequently accessed advice source for those without access to lawyers. This is unsurprising given their status as an established and well-known source of community support for legal matters. However, only four of the hundreds of bureaux offer a specialist family law advice service to deal with family legal issues in-house. CABx have expressed concern about an increase in inquiries in this area post-LASPO which "they do not have the resources or expertise to deal with" (CAB 2011:14). Common practice at CABx is therefore to suggest LIPs consult a lawyer, and this was the experience of the LIPs in this study:

...when we got as far as a court date, the first directions hearing date, at that point I went to the Citizens Advice Bureau and they give me a list of solicitors and not much else. (B022 applicant grandparents)

As noted in section 3.3 above, LIPs also regularly sought advice from court service staff but were rebuffed on the grounds that court staff were not able to give legal advice:

There are two cop outs that ... really annoy me. The first one is [having] the right paperwork and 'we're not here to advise you'. Well actually, I consider, the staff in the court office, if you ring up to say 'what form do I use?', for them to tell you and that to be taken as advice. And the other one is 'you need to seek legal advice'. Are you going to lend me the £25,000 that I need to do it? (A020 applicant LIP)

R1: It's hard ... sometimes you do know what to tell them but you can't give legal advice and that is often what they want.

I: What sort of questions or things by way of advice do people ask you for?

R2: Everything, everything and every ... yeah.

R3: It is. It is everything.

R2: What to do next. (Court A court staff focus group)

The other family justice agency that LIPs regularly encountered was Cafcass. Again, LIPs were rebuffed in their attempts to get advice and instead directed towards solicitors:

Yeah, they ask you ... do you think I should do this? Do you think I should write a statement? Do you think I should put this information in?

*Yeah, and how do you respond to those at the moment, when you get those sorts of queries?*

That they need to see a solicitor. That we're not in a position to give legal advice. (Cafcass focus group 1, Court A)

The problem with the 'see a lawyer' approach is that, as discussed in Chapter 2, most LIPs in the sample simply could not afford legal advice. There was also very little evidence of the development of free legal advice in the community. All LIPs in the study were asked whether they had had any legal advice or assistance. In this sample only one LIP had had some free legal advice organised through his university, one LIP had some support from a Bar pro bono scheme on one day of a multi-day final hearing, and a handful of others had received ad hoc pro bono advice or assistance from a lawyer while awaiting the outcome of their legal aid application.

Access to individual advice, including legal advice, was therefore a serious problem at the time of the fieldwork. This is likely to have worsened considerably post-LASPO, due to the substantially reduced availability of legally aided advice. What options might be taken to make individual legal advice available are discussed in Chapter 6 below, as are

recommendations for guidelines and training for court staff so that they are enabled to offer the information that LIPs need without straying into the territory of legal advice.

### Emotional and practical support

LIPs relied heavily on friends and family for emotional support outside of court and, in some cases, as supporters or McKenzie Friends in court (see below section 5.6).

In two of the courts<sup>64</sup> there was a Personal Support Unit (PSU). The PSU is a volunteer organisation that provides some practical assistance (with form-filling, photocopying, desk space etc) and which will also provide a volunteer to go into court with the LIP. Its volunteers do not offer legal advice. This practical and moral support was valued by the three LIPs in the observation sample who used it. However, the role is very limited:

There is a PSU officer, they can help me, just to sit next to me, but they can't do anything else other than sitting next to me... (PSU court LIP applicant wife)

I think they're [PSU] quite helpful calming people down because we get a lot of emotion ... but that's really all they can do. (Judge interview PSU court)

There were also examples cited by court service staff of PSU giving the wrong information and some volunteers were criticised by LIPs for being inflexible.

## 5.6 McKenzie Friends

McKenzie Friends, including PSU and Women's Aid volunteers, were a common source of support in this sample. 'McKenzie Friend' is the term used to describe a lay person who accompanies and supports a litigant at a court hearing and may also provide some support outside of court.<sup>65</sup> They are not normally permitted to address the court but they may, for example, according to the Practice Guidance for McKenzie Friends:

i) provide moral support; ii) take notes; iii) help with case papers; iv) quietly give advice on any aspect of the conduct of the case.<sup>66</sup>

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<sup>64</sup> The court label (Court A, B, C etc) has not been included in this section to reduce the risk of courts being identified.

<sup>65</sup> The term comes from the case of *McKenzie v McKenzie* [1970] 3 WLR 472.

<sup>66</sup> Practice Guidance: McKenzie Friends (Civil and Family Courts) available at <http://www.judiciary.gov.uk/publications/mckenzie-friends/>

As the Civil Justice Council has previously observed, McKenzie Friends (MFs) encompass a wide variety of supporters with different experience, skills and motivations (Civil Justice Council 2011:53). They might be friends, family members, volunteers from third-sector organisations, or fee-charging individuals who offer support services to multiple litigants; their support might therefore be provided on either a formal or a very informal basis. Many litigants will simply request that a friend or family member be allowed to accompany them without any knowledge that there was formal guidance on the use of MFs. Other litigants might engage the support of a previously unknown individual after seeing MF services advertised online or elsewhere.

In this sample there were 24 cases where a McKenzie Friend/supporter accompanied the LIP into the hearing. In 14 cases the MF/supporter accompanied the respondent, in eight cases they accompanied the applicant and in two cases both parties had a MF. Most MFs in the sample were not paid. Of the 24 cases where there were one or more MFs, eight were family members, six were friends, four were 'third sector' or related professionals (e.g. Women's Aid or social worker) and three were PSU volunteers. Only three of the 24 MF cases included a paid MF.

McKenzie Friends have the potential to offer valuable support to LIPs. They do, however, raise some difficult issues for the courts to consider. There was considerable variation in admission rates and criteria for MFs and in their role, their background, qualifications and personal agendas and overall competence and helpfulness to the court.

### **Different court approaches**

In interview, most judges indicated willingness, even keenness, to permit the involvement of MFs. There was noticeable variation between the courts, however, in relation to the prevalence of MFs. They were present in a third of cases at Court D, but fewer than a tenth of Court C cases. The variation appears to simply reflect local court custom and practice.

Although no court was entirely consistent, Courts B, D and E seemed to adopt a predominantly relaxed and informal approach to admitting supporters. In these courts, the MFs tended to be family members, friends and third sector workers who came into the courtroom on an ad hoc basis. Their role was entirely about emotional support, especially where the LIP was viewed as vulnerable in some way.

Case E030 was a fairly typical example of an informal MF adopting a support role. This was a case where the maternal grandfather sought to accompany his daughter who risked losing

residence of her child (the grandchild). There was very little formality in the process. The grandfather's verbal request to attend was simply conveyed to the judge via the usher rather than a CV being requested or considered by the judge. The solicitor for the other party did not object to the grandfather's presence. There were no specific instructions or warning to the MF about confidentiality. In this case the grandfather's role appeared entirely helpful, providing some sense of support to a highly vulnerable young woman. Interestingly, the MF was also relied upon heavily by the judge, in this instance to take on board clear advice about what needed to be done to secure representation for the daughter who had a chaotic lifestyle:

The [MF] was a rock in this case. It would have been totally overwhelming for the respondent mother, particularly as you saw when the prospect of her losing residence today was raised. I was looking to [MF] a lot of the time, especially when I mentioned the need to get legal representation sorted out. I was looking at him and making sure that he was nodding. I think it will need his intervention to sort out the legal aid. I don't think the daughter will manage by herself. (E030 informal discussion with the judge)

The researchers observed several other instances where family members or friends, sometimes volunteers or support workers, were admitted in a relatively informal fashion to take on the emotional support/helper role. Some of these informal supporters were asked questions by the judge in the hearing and were permitted to address the court without having formal rights of audience.

A more formal approach appeared to prevail at Court A and with some judges in Court C, where a formal application complete with CV was required. In these circumstances the MFs were less likely to be family or friends and more likely to be MFs who advertise and charge for their services. The role of these paid MFs tended to be wider. They could still act as a litigation friend but were also likely to assist with quasi-legal tasks such as document preparation, managing bundles at court, negotiation with the other side, and in some instances had formally requested rights of audience to enable them to address the court and assist with cross-examination.

Practice then varied widely. As well as the inconsistent levels of formality the researchers also observed a handful of cases in which LIP requests for a supporter to enter the court were refused, even where there appeared to be a real need for their help, as these three case studies illustrate:

B062. Respondent husband in financial remedy proceedings spoke English as a second language and requested a supporter to assist with difficult language. Request refused on the basis that the proceedings were private.

C026. Applicant father with learning difficulties requested an adjournment because neither his MENCAP supporter nor his mother had been able to attend with him. The case file made reference to a psychological assessment in which the LIP was described as having 'extremely low' ability and needing professional assistance, though not the assistance of the official solicitor, during proceedings. Request refused.

A Cafcass officer from Court E also related a recent occasion on which she was 'appalled' when a judge declined to allow a family member as a supporter because the LIP was sobbing and distraught and could not read out her request formally. The LIP was a victim of domestic violence.

### **How helpful were the McKenzie Friends?**

Court observations found that the family/friend informal supporter MFs generally were largely silent in proceedings. Their role was to provide quiet emotional support (e.g. E030), sometimes to respond to questions and sometimes to take part in discussions when invited (e.g. E029). Some also helped with communication. In one case a daughter provided vital support at a complex final hearing for an illiterate LIP (C021) and in other cases MFs provided language support.

With one exception,<sup>67</sup> the family/friends and third sector support workers the researchers observed made an entirely positive and appropriate contribution to proceedings, offering support in a way that facilitated rather than disrupted proceedings.

Within the 'paid' category, levels of qualification and motivation were variable and sometimes highly questionable. In contrast with the positive contribution of the informal MFs, the three paid MFs made a mixed contribution. The paid MF in A030 was observed by the research team, and described by the client and the judge, in entirely positive terms for their child-centred and settlement-oriented approach. This MF worked effectively with the applicant's counsel to negotiate an outcome in a very difficult case and avoided the need for a contested

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<sup>67</sup> D030, where a family member was actively fuelling the dispute between the parties albeit these activities occurred outside of the hearing itself.

final hearing. The feedback from other professionals on this MF was entirely positive. Unlike most paid MFs who appear to have (sometimes very extensive) personal experience of litigation (Legal Services Consumer Panel 2014:3.5), that MF had an atypical background as a former Cafcass guardian.

In contrast, the 'expertise' of the two other paid MFs in the observation sample was derived, at least initially, from their own history of litigation. In both cases those MFs appeared to make a negative contribution to their client's case and/or the administration of justice, either on the grounds of incompetence and/or pursuing a personal agenda. In D005, a financial remedy case, the paid MF had been granted rights of audience but the MF's limited understanding of the substantive law, inability to distinguish relevant from irrelevant issues and unwillingness to be contained contributed to the case running at more than double its time estimate. In B034, a children case, the resident mother had unwittingly recently employed a paid MF linked to a father's rights group. She appeared to have considerably weakened her case by agreeing, presumably on his advice, to a shared residence order for a very young child despite having previously been opposed to unsupervised contact.

The observation sample of three paid MFs was small but the concerns about personal agendas and issues of competence were also recurrent themes in the interviews and focus groups with family justice professionals based on their personal observations. The following quotations give a flavour of these concerns from a range of professionals:

...some of them are very good, and actually do assist. And quite unreasonable litigants in person can be helped to a more reasonable position by a McKenzie Friend. But some of them are as mad as a bag of frogs. (Judicial Focus Group Court C)

Sometimes they stir up trouble as well... you get one or two who are a bit dodgy, and they have affiliations, you know. And some people are off the internet, so they're quasi legal advisors, do you know what I mean. They haven't made it into law but this is their way in. So I think you have to be a bit careful, but obviously they're better to have than nobody. (Judge interview Court B)

It was a young, vulnerable mum with mental health issues. The McKenzie Friend was a male who was much older than her, who spoke on her behalf, dominated, gave her the impression that he had a legal background, and he didn't... And I also wondered what the nature of his interest was in the mother, who was very vulnerable. (Cafcass focus group Court A)

I have to say he [MF] was polite, he wasn't hostile, but there were just some fundamental issues about child law that he didn't understand – he hadn't got it at all... I think my opponent, his client, wouldn't have been doing some of the things that he did do that were clearly wrong. And he did go on overly long in the court hearing as well ... well we had a number of court hearings. And my heart always used to sink when he'd turned up ... And I knew that we wouldn't get as far as we might have done if he hadn't have been there.... He wants to kind of polarise ... and he sees things very much black and white, doesn't he, in terms of children issues ... not really helpful. But as I say I let him ... I agreed to let him talk in court [have rights of audience] just because I felt under pressure for that to happen. (Court B lawyer focus group)

Interestingly even the paid MF in Case A030 raised significant concerns about some other paid MFs:

There was a McKenzie Friend who shan't be named who works for [organisation] and he's a very dangerous MF. He's very angry with women. And so people can easily get in with people who aren't particularly good, but who feed into their situation and say 'oh I went through that mate', you know, and he's given some very bad advice. There's also a woman, and I don't know what her name is actually, who charges £89 an hour and does a really bad job. So it's the quality. (Paid MF in Case A030)

The implications of these findings, drawn from the cases observations and professional interviews and focus groups, are considered in section 6.3 below.

## **5.7 Professional assessment of LIP needs and signposting to services**

Previous research has suggested that the courts are not confident signposters to support services, partly because they are concerned about not endorsing one firm or agency above others (Moorhead and Sefton 2005:259). The findings from this study are similar.

The researchers saw limited evidence of the systematic assessment of the needs of LIPs. The application forms do enable the applicant to signal whether they have any particular communication (translation) or safety needs. This material was usually taken on board but



offered limited protection to respondents whose needs were not canvassed in an equivalent way. There was no clear evidence that judges formally assessed needs at the start of hearings. The variation in court procedures seemed to stem more from judicial style than being tailored to the needs of specific LIPs.

If the extent to which most LIPs seek advice is limited, interviews with judges, Cafcass and court staff also revealed an apparent lack of professional resources when it came to signposting potential advice sources for LIPs. In most of the observed cases, the judge or legal adviser made some suggestion that the LIP should get legal advice and this also seemed to be the default suggestion of court staff. This was very unhelpful if the LIP was ineligible for legal aid (which is more likely post-LASPO) and could not afford legal advice.

Some professionals said they knew of nowhere to direct LIPs for advice:

Interviewer: ...are there current sources ... resources which you can point people to or not?

Judge 1: Not on family.

Judge 2: Not really on family, no.

Judge 1: Civil yes, family no, ironically. (Judicial Focus Group Court A)

The lack of signposting indicates that LIPs might not be helped to access the best of the support that is currently available to them (such as it is) and that professional training in how to support LIPs is needed. Of course, it also exposes the limited framework that existed at the time of the study for supporting litigants in person through the process.

## 5.8 Summary

The LIP experience was mixed, sometimes better than expected but often stressful and confusing. LIPs reported fear and anxiety about the process, feeling marginalised and bewilderment and confusion, regardless of educational level.

Factors that made the experience more positive were judges and sometimes opposing solicitors who took time to explain things and being able to draw upon previous experience of being at court. A degree of self-assurance or confidence was helpful, although over-confidence and an over-estimation of one's understanding of the process could cause difficulties.

The main support needs identified by LIPs were for information about process and procedure, emotional support, practical support and tailored legal advice including broad questions about their entitlements and specific questions about tactics and tasks.

LIPs varied enormously in terms both of willingness and ability to seek support and of the effectiveness with which support was sought. A minority of LIPs were proactive in searching for information without any prompting by the courts. The proactive LIPs could be divided into the *capable/organised* and those with a *scattergun/shot in the dark approach*, although even the *capable/organised* could find it difficult to find the information they needed. Reactive LIPs responded to instructions or suggestions from family justice professionals, especially where those instructions were clear and precise. Passive LIPs relied on others to provide help, did not engage with the court process or had chaotic lifestyles.

Support for LIPs at the time of the study was disparate, variable and limited. The internet has potential for informing LIPs, as well as some very significant drawbacks in relation to relevance, accuracy as well as accessibility for all. Few of the LIPs interviewed reported using the HMCTS or MoJ websites and those who did reported they did not meet their needs. Further, not all LIPs have access to online resources and, even for those who do, websites cannot adequately substitute for the tailored legal advice that many LIPs require.

LIPs reported frustration that organisations like CABx, the court service and Cafcass were not able to offer advice and advised them to seek legal advice that could not be afforded. There is a dearth of free or low-cost legal advice in the community.

Family and friends could be very helpful acting as informal supporters, but the development of paid 'professional' McKenzie Friends was a source of real concern to judges, lawyers and Cafcass officers.

As previous studies have found, the courts did little signposting to sources of support. Professional training in how to support LIPs is needed.

The development of support services for LIPs and training for professionals should be informed by, and responsive to, the different needs and help-seeking approaches of LIPs.

## 6. Implications and Recommendations

This chapter considers the policy and practice implications of the findings reported above. The chapter begins with consideration of how far the findings are likely to apply after 1 April 2013. Given the anticipated increase in LIPs in private family law cases after the introduction of LASPO,<sup>68</sup> to what extent should one expect these ‘new’ LIPs to resemble, or to differ from, those the research team observed prior to 1 April 2013? The chapter then discusses varying methods to meet LIPs’ support needs, organised around the categories of needs identified in Section 5.3 above, starting with information needs and emotional support and then moving to the practical and advice needs of LIPs. The chapter concludes with a series of recommendations arising from this discussion.

### Key messages

- The available evidence suggested that the majority of represented parties in the sample who were in receipt of legal aid would no longer be eligible for legal aid after the LASPO reforms.
- In comparison with the observed pre-LASPO LIPs, the researchers would expect that LIPs post-LASPO would be less likely to be partially represented and more likely to present with vulnerabilities which affect their capacity to represent themselves effectively and create challenges for the courts in terms of safety at court, testing, disclosure and safeguarding children.
- The adoption of coordinated information strategies by MoJ and the Family Court is required to meet LIPs’ information needs.
- LIPs’ needs for emotional support can best be met by the admission of ‘volunteer’ (family member/friends/third sector) McKenzie Friends.
- Strategies to meet LIPs’ needs for practical support and legal advice should include the consistent adoption of a more active/inquisitorial role by family judges, universal availability of initial legal advice, and wider availability of legal representation in court proceedings where required in the interests of (individual or collective) justice.

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<sup>68</sup> The proportion of private law children cases where one or both parties was in person increased from 56% in Q1 of 2013 to 74% in Q1 2014 (MoJ, 2014, table 2.4).

## 6.1 LIPs after 1 April 2013

### Eligibility for legal aid

The observation sample included 156 represented adult litigants.<sup>69</sup> Of these, 46 were known to be self-funded, in 27 cases the researchers were unable to determine the party's funding status, and the remainder (over half) were in receipt of legal aid. Since 1 April 2013, legal aid has been only available for court proceedings where the litigant is able to produce specified evidence of domestic violence or child abuse.<sup>70</sup> For each of the legally aided and indeterminately-funded parties in the pre-LASPO sample, therefore, the researchers considered whether there was evidence available on the court file which would establish ongoing eligibility for legal aid after April 2013. The researchers' assessment of continuing eligibility could not be comprehensive, since some of the forms of evidence accepted may not routinely have appeared on court files at the time. However, in a number of cases it was evident, or could be inferred, that the litigant would not have continued to be eligible, because they were alleged to be a perpetrator of violence or abuse, or their lawyer stated in interview that they would no longer be eligible, or there was no indication of any issues relating to domestic violence or child abuse in a children's matter when any such concerns would be expected to be raised as safeguarding issues by the legal representative or by Cafcass. In most other cases, the court file and interviews disclosed no relevant evidence, but the possibility of there being such evidence could not be ruled out. Overall, though, the team found only 12 of the legally aided litigants (11 women and one man) whose court files or interviews positively contained some item of qualifying evidence of domestic violence or child abuse. Subsequent research indicates that women have encountered considerable difficulties in evidencing domestic violence for legal aid purposes.<sup>71</sup>

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<sup>69</sup> Table B.2 in Appendix B provides a tabular summary of the characteristics, including evidence of vulnerability, of each of the represented parties in the sample. Table B.1 provides similar material litigants in person.

<sup>70</sup> The evidence required is set out in the Civil Legal Aid (Procedure) Regulations 2012, Regs 33 and 34. It includes, *inter alia*: an unspent conviction for a domestic violence or child abuse offence; a police caution for a domestic violence or child abuse offence given in the last 2 years; ongoing criminal proceedings for a domestic violence or child abuse offence; a protective injunction in force or granted in the last 2 years; referral to a MARAC as a high-risk victim of domestic violence in the last 2 years; a letter or report from a health professional confirming that the person had injuries or a condition consistent with being a victim of domestic violence in the last 2 years; a letter from a social services department confirming that the person or a child was assessed as being or at risk of being a victim of domestic violence or child abuse in the last 2 years; a letter or report from a domestic violence support organisation confirming that the person was admitted to a refuge because of domestic violence in the last 2 years; a letter from a social services department confirming that the child was the subject of a child protection plan within the last 2 years.

<sup>71</sup> Rights of Women, *Evidencing Domestic Violence: A Barrier to Family Law Legal Aid* (August 2013). This report found that around half of women surveyed did not have any of the prescribed forms of evidence, while others had been charged considerable sums to obtain copies of the required evidence, or had difficulty finding a legal aid solicitor specialising in family law to take their case. See also Christina Blacklaws, 'The Impact of the LASPO Changes to Date in Private Family Law and Mediation' (2014) 44(May) *Family Law* 626-628.

Those ineligible for legal aid for court proceedings would, of course, still be eligible for legally aided mediation. The absence of FM1s from most of the court files, as noted earlier, made it difficult to determine whether mediation had been attempted or why it had not occurred. In some cases there was evidence on the file that the case had been assessed as unsuitable for mediation, either by a mediation service or by Cafcass, and in others there was evidence that one or other of the parties had refused to engage in mediation. In some, too, there were sufficient concerns raised about domestic violence or child safety to render mediation inappropriate. More generally, under the previous Legal Services Commission funding code, all legally aided parties would have been required to have their suitability for mediation assessed before being eligible for funding for court proceedings. It can thus be inferred that the legally aided parties appearing in the sample were not good candidates for mediation. Although the unavailability of funding for court proceedings may have had the effect of diverting some to mediation, this may not have presented a viable alternative for many.<sup>72</sup>

### Reasons for self-representation

The reasons for self-representation in this sample described in Section 2.3 above apply to the period preceding the LASPO Act. While the findings of previous studies and common sense would lead us to expect the same broad reasons – cost, choice and difficulties with legal aid – to apply in relation to self-representation after LASPO, logic dictates that the proportions within each category may alter. Given the substantially reduced number of legal aid grants post-LASPO, it follows that the number of LIPs who do not have representation due to difficulties with legal aid is also likely substantially to reduce. LIPs in this category are unlikely to disappear altogether, however, given that the prerequisites for obtaining public funding are now more complex, and issues of withdrawal of legal aid on means or merit grounds will remain. Since the only parties who will remain eligible for legal aid for court proceedings will be those who are able to produce the requisite evidence of domestic violence or child abuse, or who are able to establish an exceptional case for funding on human rights grounds,<sup>73</sup> the researchers would recommend that courts give serious consideration to requests to adjourn hearings to enable legal aid applications to be determined.

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<sup>72</sup> Recent research provides insights into parties' varying approaches to MIAMs and mediation, reasons for mediation not proceeding, factors leading to the breakdown of mediation agreements, cases proceeding to court following mediation, and parties for whom mediation is and is not suitable, and who require court proceedings (Bloch et al. 2014: 18-21, 33-37; Barlow et al. 2014: 17-20, 25-27; and Appendix D of this report).

<sup>73</sup> See Legal Aid, Sentencing and Punishment of Offenders Act 2012, ss. 9-10 and Schedule 1, and the Civil Legal Aid (Procedure) Regulations 2012, Regs 33 and 34.

The largest category of LIPs in the study were those representing themselves because they could not afford a lawyer. Where these LIPs had incomes above the legal aid means threshold, they would not be affected by the LASPO Act. The most likely effect of the LASPO Act will have been to add to this category a proportion of LIPs who cannot afford a lawyer because they fall below the legal aid means threshold but are no longer within scope for legal aid. The group representing themselves by choice will also remain unaffected by LASPO, because the financial affordability of legal representation was not an issue for this group. As discussed in Chapter 2, however, it is possible that this category may also grow if modifications to court procedures and other forms of assistance made available to LIPs have the effect of encouraging people to feel that legal representation for family law proceedings is unnecessary.

### Characteristics of the ‘new’ LIPs

In a context of greatly restricted availability of legal aid, it seems likely that more LIPs in future will experience a complete lack of representation rather than having legally-aided representation for some part of their case. At the same time, law firms appear to be increasingly offering fixed-price packages and other forms of unbundled services (see Maclean 2014), so this form of partial representation may increase. But since these services require payment, those formerly eligible for legal aid may have limited capacity to afford them. Overall, then, it may be expected that the phenomenon of LIPs experiencing partial representation will decline,<sup>74</sup> with consequent implications for the courts and for LIPs in terms of support needs.

The legally aided parties in the observation sample were also more vulnerable as a group than the observed litigants in person.<sup>75</sup> Being a victim of domestic violence was the most frequently occurring form of vulnerability, but a higher proportion of the legally aided group than the LIP group fell within this category. As noted above, it cannot be assumed that victims in these cases will be able to establish continuing eligibility for legal aid. In some cases the abuse consisted of controlling behaviour, emotional abuse, verbal abuse, bullying, intimidation or threats, which would not tend to generate the kind of evidence required. In one unusual case (C021), the respondent mother had been severely beaten by the man she had lived with after separating from the father of her child. The perpetrator had been

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<sup>74</sup> Consistently with this, mediators reported to Bloch et al. (2014: 15, 38) that people attending mediation services post-LASPO are less prepared, less advised, and less likely to have been ‘filtered’ by lawyers.

<sup>75</sup> Table B.1 in Appendix B provides a tabular summary of the characteristics, including evidence of vulnerability, of each of the litigants in person in the sample. Table B.2 provides similar material in relation to represented parties.

convicted and imprisoned, and the mother had relocated, but she lived in fear that he would track her down on his release. The applicant in the case, however, was the paternal grandmother, who wanted continuing contact with her grandchild. The mother was contesting the application because she feared – and the court accepted – that such contact would compromise the secrecy of her whereabouts and so jeopardise her and the child’s safety. In this situation, however, because the applicant grandmother was not the perpetrator of the violence against her,<sup>76</sup> the mother would have been ineligible for legal aid.

In addition, the legally aided group had higher levels of drug, alcohol and mental health problems, and a higher proportion of non-English speakers requiring interpreters, than did the LIPs observed. Further, the legally aided group in the observation sample contained a higher proportion than the LIP group of litigants with serious criminal histories.

The analysis suggests, then, that the ‘new’ LIPs are likely to present a greater challenge for the family courts both quantitatively and qualitatively after 1 April 2013.<sup>77</sup> The interviews with lawyers indicated that some of this group would not feel themselves capable of self-representation and thus may not bring potentially meritorious applications, but respondents will still be compelled to respond when an application is brought, whether or not they feel capable of doing so. The more vulnerable profile of formerly legally aided parties suggests that the cases of those who do come to court may also give rise to greater issues of safety at court, greater problems with drug and alcohol testing, psychiatric assessments and police disclosure, and greater reliance on Cafcass to fully identify safeguarding issues and protect children’s welfare.

## 6.2 Information needs

The research highlighted an overwhelming need for more and better information for LIPs at every stage of the court process,<sup>78</sup> echoing the recommendations of the Hickinbottom Report (Judicial Working Group on Litigants in Person 2013: para 8.3). Many of the existing resources have been produced by and for family justice professionals rather than for LIPs. An obvious priority therefore, is for all communications – forms, leaflets, signage at court – to be re-evaluated from the perspective of LIPs and (if necessary) redesigned with their various

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<sup>76</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, Schedule 1, para 12.

<sup>77</sup> Again, this is consistent with the findings of Bloch et al. (2014: 38) that clients attending MIAMs post-LASPO were “more diverse, exhibit[ed] a wider variety of circumstances” and presented “more challenging propositions for mediators”.

<sup>78</sup> See Section 3.3 above for the pre-court stage, Section 4.4 for the hearing stage and Section 5.3 and 5.5 for discussion of support needs and information sources.

needs and approaches to preparation in mind. Very similar proposals to redesign all court materials from a LIP perspective have been put forward by the Chancery Modernisation Review (Briggs 2013: paras 9.15, 9.89-9.96).

At the same time, the researchers found that whilst all LIPs require information, relatively few LIPs searched proactively for information and many more do little, if any, searching.<sup>79</sup> LIPs also varied in the extent to which they were able to take on board information provided, a number of them experiencing various difficulties with literacy.<sup>80</sup> This has implications for the type of information provided and how it is made available. It also has implications for how far reliance can be placed on simply providing information through written and online (“passive information”) sources for LIPs to find and assimilate without any assistance. At least some of this information should be delivered directly to LIPs. Moreover, the interviews with LIPs made clear their need for supporting verbal explanations as well as passive information.

### **Forms and form finder**

The study indicated that the current court forms are complex and difficult to complete without assistance, particularly the financial remedy forms.<sup>81</sup> There is an extensive body of knowledge about how to design legal forms to make them easy for LIPs to understand (Zorza 2009:527). This knowledge could be used to redesign all court forms and accompanying leaflets. A redesign of the online HMCTS form finder to make it more LIP-friendly would be very helpful, as would a facility to e-file documents.

### **Leaflets, letters and templates**

Given that many LIPs take a reactive or passive approach to help-seeking,<sup>82</sup> it makes sense for the court to make the most effective use of its communication opportunities with LIPs, as this might be the only information that some LIPs obtain prior to attending court. Particular attention should be paid to first appointment letters so that they provide clear information on dates, times and location, a source of confusion to LIPs interviewed for the study. LIPs also asked for information about what is likely to happen at court, including an explanation of the appointments system, and what to bring. A very short but clear letter could ideally be accompanied by a hearing-specific leaflet (e.g. first hearings in Children Act matters or for financial remedies etc) with further information as well as links to the HMCTS website. It would be very useful to have a range of leaflets available on specific hearing types (first

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<sup>79</sup> Section 5.4 above.

<sup>80</sup> Section 2.5 above. And see Briggs (2013: paras 9.24-9.27).

<sup>81</sup> Section 3.3 above.

<sup>82</sup> Section 5.4 above.



hearings, the FDR, final hearings etc) and tasks, i.e. disclosure or preparing for a contested hearing.

It would also be very helpful if the court gave LIPs more and clearer guidance about the information or evidence it wants to collect. Examples suggested in the professional focus groups included making a range of templates available, e.g. for statements or case chronologies. A range of model statements could also be made available online. Similarly, whilst the President's Practice Direction (PD) on bundles<sup>83</sup> is comprehensive and makes sense to lawyers, the language used is highly technical and as such, likely to be very difficult for LIPs to understand, even assuming they are aware of its existence.<sup>84</sup> It would assist the court and LIPs if the essential elements of the PD could be translated from technical legal language into a short leaflet that LIPs can understand and that is made available to LIPs at the appropriate point in the court process.<sup>85</sup>

As many LIPs took a passive approach to help-seeking, it would also be beneficial if supporting materials are physically provided to the LIP at the relevant stage of proceedings. Material for the first hearing could be sent out by the court. Other material, for example, on preparing for a contested hearing could be handed to the LIP by the judge in the court room. Ideally, the judge would briefly summarise the contents of the material, answer any questions and give a very clear message that the judge expects the LIP to read the material and take any necessary action. This would address some of the difficulties identified in Section 4.5 above where LIPs left court without understanding what they had to do next.

## Online resources

The research highlighted that there is a pressing need to establish a single authoritative 'official' website that LIPs will know immediately can be trusted as a provider of accurate, comprehensive and unbiased information with no hidden agenda.<sup>86</sup> The site, in the view of

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<sup>83</sup> Practice Direction 27a – Family Proceedings: Court Bundles (Universal Practice To Be Applied In All Courts Other Than The Family Proceedings Court)

<sup>84</sup> "The system works with an assumption that both parties understand how to manage a case. You know, bundles, best, good example. The system works on the basis that everybody knows there's a practice direction. Now you can put on an order, "Both parties are reminded of the need to comply with practice direction 46", whatever, it's not going to mean anything to a litigant in person. So they will turn up, if there's two, they will turn up to their three day hearing and assume, somehow magically, that the judge will have a complete set of all papers, in front of him, paginated and ready to go. And the judges assume that litigants in person are turning up with bundles, and there's no meeting of minds (laughs). So there's a certain scratching of heads, you know, "How are we going to do this hearing?" (Court D, lawyer focus group 2).

<sup>85</sup> The Briggs Report (2003: para 9.15) also notes the need for materials to be reviewed from a LIP perspective and that it not sufficient simply to remove Latin and legal terms or use short sentences.

<sup>86</sup> See Section 5.5 above for evaluation of existing sites. A single authoritative official website as the primary internet source is also recommended in the US context by Zorza (2009) and in Canada by Macfarlane (2003).

the research team would ideally be part of the HMCTS site and should include all the resources that a LIP needs in one place as a virtual one stop shop. These resources would include the form finder, the full range of leaflets and a range of easily navigable information, ideally in visual as well as written form. Previous literature and the interviews with LIPs and court staff have indicated that basic 'how to' skills material, including how to file and serve documents, prepare a statement, negotiate etc., would be helpful for LIPs (see Moorhead and Sefton 2005). The California court website<sup>87</sup> and its self-help centre provide a useful model to consider. The researchers would contrast this with the current HMCTS site which appears to be oriented primarily towards lawyers and has no visible pathway for LIPs.

The researchers would also caution against relying upon the Sorting out Separation site/app to meet the information needs of LIPs (see also Maclean 2013a, 2013b). It currently lacks the official stamp of approval that the HMCTS site would give or provides sufficient in-depth information relevant to LIPs rather than the diverse population of separated individuals. Indeed a recent evaluation of the effectiveness of the app noted that "users were often unclear about the purpose of the site and the range of information it offers" (Connors and Thomas 2014:59). It recommended that a standalone site with information clearly branded as government-supplied should replace the app embedded on different websites. The evaluation also noted a level of frustration with the limited information provided on the site prior to being signposted to other (non-government) sites (2014:59). A complementary analysis of traffic indicated that the app had attracted a fairly modest 91,469 unique users over a 13 month period to January 2014, only 13% of whom went beyond the home page (DWP 2014).

### Face to face support

The findings from this study clearly indicate that the support needs of LIPs will not be met solely by relying upon written or online material or 'passive information'.<sup>88</sup> Indeed, as others have found, effective use of online sources is dependent upon a baseline level of legal knowledge and understanding (Macfarlane 2013:10; Denvir et al. 2011). Further, some LIPs also need the opportunity to have verbal explanations or face to face support (Moorhead and Sefton 2005:257; Macfarlane 2013:10).

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<sup>87</sup> At <http://www.courts.ca.gov> It is notable that the link to the online self-help centre is the first item on the homepage.

<sup>88</sup> See, for example, Section 5.3 above.

Rather than trying to create new sources of support, the evidence from the study suggests that LIPs most commonly turn to court staff to provide some face to face information support, including help with, for example, identifying the appropriate form, what terms mean and how to file and serve.<sup>89</sup> Yet the researchers note that four out of five of the sample courts in the study had had their court counter hours reduced or switched from drop-in to an appointments system. The study shows that this is likely to create additional work<sup>90</sup> for court staff just when demand is likely to increase with the withdrawal of legal aid.

The focus groups with court staff conducted for this study expressed concerns that court service staff may stray, or be pulled, into an advice-giving role, not least given the lack of other sources of free legal advice in the community. There is some evidence from this study and others (Moorhead and Sefton 2005:261) that concern about advice-giving results in court staff being hesitant about giving even neutral information. Experience from other jurisdictions indicates that the advice-information problem can be addressed with clear guidelines and training based on discussion of concrete examples of what does and does not constitute information or advice (Zorza 2009: 523-4).

### In the hearing

The information needs of LIPs extend to the hearing itself. LIPs need information about the nature of the hearing and what will be expected of them. The interviews with LIPs indicated that it would be helpful for core information to be provided in advance as part of an information pack sent by the court.<sup>91</sup> A range of YouTube videos demonstrating what a courtroom looks like, where to sit, how to address the judge, etc. would also be useful for some, although would need to be clearly signposted in information literature and on the website.

In most hearings observed by the researchers, judges provided little, if any, introduction, ground rules or explanation of the process to LIPs.<sup>92</sup> The lack of explanation appeared to be the result of judges being accustomed to the full representation model, where no explanation

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<sup>89</sup> See Section 3.3 above.

<sup>90</sup> See Section 3.3 above when errors with LIP paperwork caused additional work for court staff and judges.

<sup>91</sup> "It would have been really nice to just have had a little information leaflet saying this is what will happen in the court, this is what to expect and this is the procedure and these are the type of questions you are allowed to ask and how you should ask them and when you should ask them because I didn't know at all how to handle myself in there, I just had to sit down, smile and hope for the best really you know". E003 App LIP.

<sup>92</sup> See Section 4.5 above. The lack of process explanation has been noted in other jurisdictions – see Macfarlane (2013: 13).

is needed for lawyers. The research team found this was not sufficient for LIPs who may have little understanding of the process or how the court expects them to contribute. To support the LIP, it would be very helpful if judges could brief LIPs verbally at the start of each hearing and throughout the hearing as needed. This was particularly important in first hearings. The initial introduction could usefully include the purpose of the hearing, an outline of the process and ground rules, including turn-taking rules.<sup>93</sup>

### 6.3 Emotional support

The interviews with many LIPs underlined that attending a court hearing without the advice as well as the partisan support of a lawyer was very stressful.<sup>94</sup> This was particularly so where LIPs were fearful of their former partner or felt completely out of their depth. Not surprisingly having access to emotional support, particularly in the courtroom itself, was flagged as an important need by LIPs during interviews with them.

The Personal Support Units (PSU) can play a role in providing emotional support for some LIPs but the PSU is only available in a small number of courts.<sup>95</sup> The observations and interviews with LIPs suggested instead that an effective and readily available method of providing emotional support is to allow a family member, friend or third sector volunteer worker to accompany a LIP into the courtroom.<sup>96</sup> The use of these informal supporters<sup>97</sup> has developed at local level in response to the needs of LIPs. Their purpose is simply to provide emotional support for LIPs and not to take on a quasi-legal role. The value of this kind of support is such that the researchers think there should be a presumption in favour of including an informal supporter, to be overturned only if the court expects or finds the informal supporter to be disruptive or unhelpful. The research team do not think it necessary that these informal supporters should be required to submit a CV given that they are not there to undertake quasi-legal tasks. Indeed at least half of these informal supporters in the observation sample were admitted without the formal process of submitting a CV. Courts should, however, ensure that all informal supporters are given clear guidance at the start of proceedings about their role and about confidentiality. The researchers observed some judicial officers giving brief guidance on this point, but others nothing at all.

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<sup>93</sup> See below for a more detailed list.

<sup>94</sup> Section 2.5 and 5.2 above.

<sup>95</sup> Section 5.5 above. PSUs have been opened in further courts since the time of the study, but coverage is still limited.

<sup>96</sup> Section 5.6 above.

<sup>97</sup> The researchers are agnostic on the question about whether they should be called McKenzie Friends, informal supporters or something else.

In contrast, the expansion of paid or 'professional' McKenzie Friends was raised as a concern by judges, lawyers and Cafcass officers in this study and the research team themselves observed directly examples of poor practice to the detriment of their 'client' and to the court process.<sup>98</sup>

The concerns about 'professional', in particular fee-charging, McKenzie Friends are not new and have been extensively rehearsed elsewhere (e.g. Civil Justice Council 2011:54; Judicial Working Group on Litigants in Person 2013, especially para 6.8).<sup>99</sup> Most recently a Legal Services Consumer Panel report (2014) identified a long list of risks that paid MFs might pose, including agenda-driven MFs, poor quality advice, not understanding the role, escalating fees and breach of privacy. The report also included a number of case studies, all of poor or bad practice by MFs, and no examples of good practice.

Somewhat surprisingly the LSCP report recommended that a "more positive" approach be adopted to paid MFs, although it drew short of recommending automatic rights of audience. The positive benefits of paid MFs were said by the LSCP to be that they improved access to justice, that some help was better than no help at all and that they widened choice for consumers. The methodology of the LSCP report can be criticised, however, for being over-reliant upon data supplied by paid MFs themselves.<sup>100</sup> The LSCP report acknowledges the presence of poor MFs but asserts that only a *minority* of paid MFs are to be avoided, cause consumer detriment, or cause harm (2014: paras 5.20, 6.9, 6.19). However, it is not at all clear on what evidence those claims about incidence could be made on the basis of the LSCP methodology, other than the testimony of the paid MFs who were interviewed. The researchers suspect, however, that examples of poor practice are not rare. Certainly in this research, it was relatively easy to find actual observed examples of very poor practice. Further, in the interviews and focus groups the judges, lawyers and Cafcass officers were readily able to supply other examples from their own experience— indeed, this emerged as a matter of considerable concern to them.

The LSCP report also suggests that the Court would be able to identify and then manage poor or harmful MFs. The researchers are less sanguine than the LSCP that "tools to prevent McKenzie Friends from harming others are already available to judges and should be used

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<sup>98</sup> Section 5.6 above.

<sup>99</sup> See also Re J [2010] 1 FLR 1290, [2009] EWCA Civ 1210.

<sup>100</sup> The main form of data collection for the LSCP report was analysis of paid MF websites and interviews with 28 fee-charging MFs reporting on their own performance. It did not include observation of their practice or interviews with their 'clients' or family justice professionals (judges, Cafcass, lawyers etc) to provide an objective assessment of their value.

robustly” (2014: para 6.19). Much of the problematic behaviour demonstrated by paid MFs will occur out of sight of the court and therefore the courts will be unable to provide protection. Equally one cannot expect lay consumers to always know what they need to know or to be able to evaluate the advice they receive. In this sample the clients of all three paid MFs were very positive about the MF’s efforts. In the case of the former Cafcass officer the faith of the client appeared entirely justified. However, in the other two paid MF cases the positive appraisal appeared misplaced given that the MF appeared to the neutral observer to have damaged rather than enhanced their client’s case.

Judges may look for whatever help and assistance they can get. However, the potential for McKenzie Friends to be “covert foes” needs to be acknowledged and addressed. At the very least there is a need for a code of practice or revised practice guidance, and the question of whether a regulatory framework should be developed in response to the emerging McKenzie Friend market needs to be addressed. Overall, although the potential value of a supporter should not be discounted, it is doubtful whether formal MFs (particularly paid MFs) are clearly of sufficient value to justify a charge for their services. If emotional support is the strongest function of a MF then the focus should be on friends/families/third sector support workers as informal supporters coupled with more inquisitorial judicial styles, rather than an expansion of paid MFs, especially with rights of audience. Help with legal tasks may well be more reliably and cost effectively provided by legal professionals (see below).

## **6.4 Practical support and legal advice**

The research clearly identified LIPs’ needs for both practical support and tailored legal advice. The practical support needed includes help with paperwork (completing forms, writing statements, preparing Scott Schedules and bundles), help with advocacy in court, and help with evidence-gathering (arranging and paying for e.g. hair strand and DNA tests, police disclosure and expert reports).<sup>101</sup> LIPs also need assistance in framing their case in legal terms, including knowledge of the legal rules, principles, entitlements and requirements relevant to their case, and the parameters of legally possible outcomes.<sup>102</sup>

As discussed in Chapters 3 and 4 above, this is all work that would be done – and that the court process presumes will be done – by lawyers. Where there is no lawyer, previous socio-

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<sup>101</sup> See Section 4.5 above.

<sup>102</sup> See Sections 3.2-3.3 above. The Briggs Report (2013: paras 9.40-61) also contains some detailed suggestions for how to maximize access to free or affordable pre-proceedings legal advice as a means to divert weak cases or to ensure cases are more effectively prepared. The recommendations relate to Chancery practice but may have wider application.

legal studies of LIPs have identified three alternative approaches to providing this sort of practical support and legal knowledge: (1) train LIPs to become quasi-lawyers, (2) provide some kind of lawyer-substitute, and/or (3) change the court process so it is not reliant on lawyers/individual parties doing all the work (e.g. Kim 1987; Rosenbloom 2003; Moorhead 2007; Adler 2008; Gaze and Hunter 2009). Based on the findings reported in this study, each of these approaches offers possibilities and these are outlined below. None of these approaches, however, offers a complete solution for all cases or is without limitations. This section therefore concludes by identifying circumstances in which practical support and legal needs are so great that there is no adequate substitute for providing a lawyer in order to enable a just and efficient outcome.

### **Train LIPs to become quasi-lawyers**

Lawyers undergo years of training before being qualified to practise, and enhance their skills and knowledge as they gain experience in practice. LIPs can never be put in the same position. But one approach to ensuring that the practical tasks usually accomplished by lawyers are completed when there are no lawyers is to find ways of equipping LIPs to carry out the same tasks themselves. In other jurisdictions, a range of methods have been devised to provide LIPs with limited practical support and legal knowledge. These include document assembly systems, coaching and self-help centres.

*Document assembly systems* are web-based programmes which not only provide blank forms but enable them to be completed online, with well-designed screens, branching logic so the client is only presented with the questions they need to answer, and text or video instructions. At the end of the process the client can save or print the completed document, or even e-file it automatically. These have been successfully developed to support LIPs in a number of US family court jurisdictions (see Zorza 2009: 527-8), but are mainly familiar in the UK in other contexts (e.g. tax returns, visa applications).

*Coaching* is the provision of free, individualised assistance with various aspects of the court process on an as-needed basis, such as reviewing documents and answering procedural questions. The coaching may be provided face to face, by telephone or by email. It does not entail the provision of tailored legal advice but focuses on specific (rather than generic) information needs to equip the LIP to act alone. Something like the concept of coaching was suggested by one of the LIPs interviewed.<sup>103</sup>

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<sup>103</sup> “I don’t think it’s a case of needing a solicitor [for] representation [in the hearing], it’s the guidance and advice of how do I prepare things and what do I need to say, and if I had someone I could phone, if there is just a

*Self-help centres* have been established in a number of US family courts. These centres provide a range of services including workshops on court procedures and family law, one-to-one assistance (by various delivery methods), and provision of a range of resources including computers, printers and photocopiers, work tables and a law library (Zorza 2009: 522). Once again the focus is on neutral, non-confidential information rather than individualised legal advice (so the service would be available to both parties to a case), but the information is “detailed, focused, and directly relevant to the decisions [LIPs] must make and the steps they must take to advance their cases” (Zorza 2009: 522-23). One of the best known and most extensive family law self-help centres has been established by the California court system.<sup>104</sup> The centre in Los Angeles is located in the court building adjacent to the court counters, and staffed by a multilingual team of volunteer law students under the supervision of experienced attorneys. Co-location with court counters has a range of benefits, including enabling court and self-help centre staff to work cooperatively. According to Zorza, self-help centres achieve a high level of client satisfaction. “What the self-help programs do is help litigants come to court more informed, better prepared, better able to make sure their cases move forward, and much more content with the court and its operations” (2009: 523). In England in the small number of courts in which it is available, the PSU does provide some of these practical forms of help, for example in accessing and completing forms, although the range of services offered is more restricted than those developed in California.

Evidence from LIPs and professionals presented above suggests that these various measures might provide welcome solutions to practical challenges faced by LIPs. However, the one thing they cannot provide is tailored legal advice. Their efficacy will also depend on a number of factors, including the extent and quality of provision, accessibility, the capability of LIPs to absorb and act upon the information provided, and the complexity of their cases. Furthermore, the LIP hearings that identified as ‘working’ in Section 4.3 above were either relatively simple cases involving a competent LIP, or cases in which much was accomplished by a third party or an inquisitorial judge. For these reasons, the researchers would caution that, although efforts to equip LIPs to accomplish practical tasks could serve a useful

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helpline, you know, that gave you free advice but working with the same person all the time so you are not just phoning someone at random, and that would have been such a massive help...” (E003 applicant LIP – had had 3-4 hours free legal advice via university)

<sup>104</sup> See [www.courts.ca.gov/selfhelp](http://www.courts.ca.gov/selfhelp); and for more detail, Bonnie Hough, ‘Self help: How far can it go’, presentation at the ILAG conference, The Hague, 14 June 2013, available at <<https://app.box.com/s/qg91c4h441ifpyivj9an/1/982654047/8972242767/1>>accessed 31 August 2013.



purpose, they are only ever likely to be partially effective, and are likely to be most helpful to the most able LIPs in less complex cases.

### Provide a lawyer-substitute

A second approach to overcoming the practical challenges faced by LIPs is to provide some kind of lawyer-substitute, instead of expecting LIPs to manage everything themselves.

Lawyer-substitutes provide some elements of legal services short of full representation, either to the LIP, to the court or to both. They may either act in a partisan capacity or as a neutral third party. Partisan lawyer-substitutes provide partial legal services to LIPs on either a free or paid basis. In this jurisdiction, free services may include CABx, pro bono schemes or duty lawyer schemes. Paid-for services may include unbundling (known in the US as “discrete task representation”), the Bar’s public access scheme and paid McKenzie Friends. Neutral third parties may focus on dispute resolution (mediators, Cafcass conciliation) or engage in more extensive work for the benefit of the court (Cafcass duty officers, Guardians and children’s lawyers). Whilst there are a wide range of potential ‘lawyer substitutes’ there are limits to the extent that any one of these, separately or in combination, might be able to meet all the advice needs of LIPs. The report comments briefly on each of these lawyer-substitutes below.

*Citizens Advice Bureaux.* As discussed in Section 5.5 above, many LIPs were aware of the CABx but were disappointed by the inability of CABx to assist them with case advice. The CABx could potentially function as a very useful source of practical support and information for LIPs in family law, as they currently do in relation to other legal problems. However, this would be dependent on them having the resources to include private family law matters into their core areas of advice in all or most of their bureaux rather than the handful of bureaux as at present.

*Pro bono* schemes have been slow to develop in the family law field. They rely on lawyers donating their time in a context in which margins are tight and the potential demand could be overwhelming, given the high volume of private family law applications. Practical issues around the availability of pro bono lawyers mean that, at best, pro bono schemes are only likely to support a limited number of LIPs for a small part of the legal process.<sup>105</sup> Only two LIPs in the observation sample had used pro bono services at two different courts, and in

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<sup>105</sup> A legal advice service set up by the RCJ Advice Bureau limited the number of advice sessions available for family matters to three per litigant but did not impose such a limit on other civil legal advice. See Sefton et al, (2013).

one of these cases – a final hearing – the service was largely ineffective, since the lawyer was not available for the start of the hearing, and by the time they arrived later in the day they were unable to be of much use to either the LIP or the court. Indeed, the pro bono scheme at this court had more or less collapsed due to poor design and insufficient staffing. Recent research (Sefton et al. 2013) revealed that a pro-bono advice scheme for family and civil proceedings was of limited effectiveness in terms of having a discernable impact on the progress of proceedings. Much was contingent on the ability of the LIP to follow up on advice and on factors beyond the control of the LIP and the pro bono adviser. It seems unlikely, therefore, that pro bono schemes will fill much of the gap left by the absence of legal representation.

*Duty lawyer* schemes have not yet begun to develop in family law in England and Wales, although they have been tried (with mixed results) in other jurisdictions (see e.g. Hunter et al. 2009). Providing duty services at court in family law is very different from doing so in criminal law, since the range of work the duty lawyer might be asked to do and the range of issues potentially involved is so much wider.<sup>106</sup> They may also be asked to advise and assist both parties to a case rather than only one. Although both LIPs and professionals involved in the study made reference to the desirability of a duty lawyer scheme, the interviews with lawyers revealed widespread reservations about the practicability of such a scheme. As with court pro bono schemes, any duty lawyer service established would need to be carefully designed, appropriately staffed to avoid conflicts of interest, and would probably also need to operate in conjunction with other forms of assistance

*Unbundling.* As noted in Sections 2.4 and 5.3 above, quite a few of the LIPs in the study had arranged to receive some form of paid-for unbundled services from solicitors, although some said they had had difficulty finding a solicitor who would offer services on this basis. It appears that the withdrawal of legal aid for family law proceedings has resulted in wider offering of fixed-price packages and modular services by law firms (see Maclean 2014), although LIPs who would previously have been eligible for legal aid are unlikely to be able to afford to pay for anything. The researchers also noted the perception that some law firms felt restricted in offering unbundled services because of insurance issues. In the US context, Richard Zorza has argued that “the bar must be supported to provide services in the most flexible and low-cost way possible...including much more widely available discrete service representation” (2009: 542). The Law Society have recently issued a practice note on

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<sup>106</sup> As noted, for example, in the Court E lawyer focus group. See also Hunter et al. (2009).

unbundling.<sup>107</sup> But further guidance as to what tasks a lawyer can realistically divide into manageable chunks to assist LIPs who wish to use legal services for certain discrete tasks rather than engage a lawyer on a traditional full retainer may be useful for both LIPs and the legal profession in clarifying areas of current uncertainty. There are also some doubts about whether unbundled services can provide an adequate substitute for full representation. Albeit on housing cases, Greiner et al.'s randomised controlled studies in the US (2013) suggest that full representation offers significantly better outcome for clients than unbundled services, at least in some circumstances. In this study a number of LIPs who had had some legal advice came unstuck when they came to represent themselves in the hearing (e.g. D024).

*Direct access to a barrister.* The Bar's public access scheme enables individual litigants to engage counsel directly rather than having to instruct a solicitor first. Under the scheme barristers can represent a client in court, provide specialist legal advice, assist in drafting correspondence, statements and documents and advise on the use and instruction of experts. They cannot correspond directly with the other party, directly instruct experts, issue court documents, collect evidence or interview witnesses. Nevertheless, the assistance they can provide is fairly extensive. Very few of the LIPs in this study knew of this scheme, and as with unbundled services, it may not be affordable for many.

*Paid McKenzie Friends.* As indicated in Section 5.6 above, the research team do not advocate more widespread use of paid McKenzie Friends acting as quasi-legal advisors without qualifications, regulation or insurance. A lawyer in one of the focus groups argued in any case that fully qualified direct access barristers are likely to offer as good if not better value for money (Court D lawyer focus group 2).

*Mediation/Cafcass conciliation.* The lawyer's settlement-brokering role at court may alternatively be performed by court-based mediators or by a Cafcass duty officer at FHDRAs in children's cases. These sources of assistance, of course, already exist and the researchers certainly witnessed instances of the latter in the court observations. They are sometimes effective in promoting agreement between the parties but very often are not for a variety of reasons. Cafcass officers interviewed expressed concerns about the resource implications of any increased expectations of Cafcass in this regard should the number of LIPs increase as anticipated.

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<sup>107</sup> See <http://www.lawsociety.org.uk/advice/practice-notes/unbundling-family-legal-services/>

*Neutral third parties.* The researchers saw several examples in the observation study of courts relying on Guardians, children’s lawyers and Cafcass duty officers not only to work with the parties out of court in attempting to reach an agreement, but also to identify the parties’ positions, present the issues to the judge in court, and draft any resulting orders – as in the ‘third party (quasi) lawyer’ case type identified in Section 4.3 above. As observed earlier, this could be a very effective model, including in cases involving relatively high conflict. However, if pursued as a formal strategy for dealing with the practical support needs of LIPs it would clearly require more 16.4 Guardian appointments, and consequently greater input of Cafcass resources (both duty officers and Guardians) and greater legal aid expenditure on children’s lawyers. It would also not assist in financial order cases.

*Summary.* The study has highlighted the importance of initial legal advice at the outset of proceedings, to identify and complete the relevant forms, assist in framing the case in legal terms, and provide knowledge about legal rules, entitlements, requirements and the parameters of legally possible outcomes.<sup>108</sup> These findings are reinforced by the ‘Mapping Paths to Family Justice’ research, which indicates the importance of initial legal advice prior to mediation.<sup>109</sup> Early consultation with a lawyer can also ensure that cases are referred for mediation assessment, and attempts can be made to broker a resolution without the need for court proceedings. The researchers do, therefore, recommend that initial legal advice (in addition to mediation information) is made universally available in private family law cases. This would provide a uniform, well-organised and widely available response to pre-court support needs which would enable parties (i) to receive initial legal advice; (ii) to be referred to mediation if appropriate; and (iii) to be assisted to prepare for court (including lawyer-led attempts to broker a resolution) if mediation is unsuitable or unsuccessful.

While initial legal advice could either divert LIPs from court or deliver them in a better state to the first hearing, their needs for practical and legal support during the court process would remain. The wide range of lawyer-substitutes offers a plethora of potential ways in which LIPs can be assisted in this way. However, most of the lawyer-substitute options require further investment and/or development to function optimally. Rather than suggesting such investment and/or development at this stage, the researchers consider that efforts would be more usefully focused on developing the third approach to enabling LIPs to function

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<sup>108</sup> See Sections 3.2-3.3 above.

<sup>109</sup> This is the study from which the secondary analysis in Appendix D is derived. On the importance of legal advice prior to mediation, see Barlow and Hunter, ‘Clients’ Views of Family Dispute Resolution’, paper delivered to the Research Committee on Sociology of Law conference, Toulouse, 4 September 2013; and Barlow et al. (2014).

practically without lawyers: modifying the court system itself to reduce the range of tasks normally required to be performed by lawyers.

### Modify the court system

The absence of legal representation raises questions about the appropriate role of the judge in family proceedings. The research team found, as others have done (Moorhead and Sefton 2005: 260-61), considerable variation in how judges interpreted their role: as purely a neutral arbiter or as a more active participant to ensure that both sides are heard, consistent with the overriding objective to ensure a fair trial (see Section 4.6 above). The diversity of approaches appeared to reflect individual judicial styles rather than the particular circumstances of individual cases, raising questions of fairness between cases.

The view of the research team, based on the observations and interviews and the earlier discussion, particularly in Chapter 4, is that even with the level of LIPs observed (quite apart from any anticipated growth in numbers), the traditional neutral arbiter role of the judge is not sustainable. At the same time, it is vital that there is some degree of consistency of approach between judges in a more activist role. This is ultimately a matter for the judiciary to decide. The research team note that the 'Ryder reforms' now in the process of implementation envisage family judges being active case managers and assuming a more inquisitorial role,<sup>110</sup> but it is worth considering what this might mean specifically in the context of dealing with LIPs. The evidence from the study suggests that semi-represented and non-represented cases raise different issues and call for different solutions, and so they are addressed separately here.

*Semi-represented cases.* The major issue in semi-represented cases is the need to level the playing field between the represented and unrepresented parties, enabling the LIP to participate effectively while allowing the opposing lawyer to represent their own client. The researchers note that even in the 'holding-their-own LIPs' cases identified in Section 4.4 above, which involved relatively simple, semi-represented Children Act hearings with competent LIPs with prior experience, the judicial officer acted to protect the LIP by more extensive signposting of process, attempting to use everyday language, and ensuring the LIP had time to have their say. A more developed model of "engaged neutrality" suitable for

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<sup>110</sup> Similar developments are afoot in other branches of the law. The Chancery Modernisation Review led by Lord Justice Briggs proposes a more investigative role for the judge in identifying triable issues at the start of proceedings, noting it may "be achieved more quickly, economically and less confrontationally by a process of judge-led investigative case management" (see Briggs 2013: para 9.79).

semi-represented cases has been suggested by Zorza (2009: 530-31). Drawing on analysis of videos of live trials he identifies the following elements of best practice in supporting LIPs:

- Framing the subject matter of the hearing.
- Explaining the process that will be followed or guiding the process.
- Eliciting needed information from the litigants by:
  - Allowing litigants to make initial presentations to the court
  - Breaking the hearing into topics
  - Obviously moving back and forth between the parties
  - Paraphrasing
  - Maintaining control of the courtroom
  - Giving litigants an opportunity to be heard while constraining the scope and length of their presentations, and
  - Giving litigants a last opportunity to add information before announcing a decision
- Engaging the litigants in the decision making.
- Articulating the decision from the bench.
- Explaining the decision.
- Summarizing the terms of the order.
- Anticipating and resolving issues with compliance.
- Providing a written order at the close of the hearing.
- Setting litigant expectations for next steps, and
- Using nonverbal communication effectively.

Zorza argues that these practices create equality of arms between the represented and unrepresented party and thus address issues of perceived unfairness on all sides in semi-represented cases. Both sides are equally included and the single lawyer knows what to expect, and is left to represent their own client rather than facing demands from the court to 'look after' the litigant in person as well.

This approach, if adopted, would have resource implications. The explanations of process, drafting of an order and checking the LIP's understanding will take time that is not currently built into listings. The time saved by explaining process and checking understanding of next steps may prevent longer hearings or more hearings but there is no guarantee that the time will be clawed back. Requiring judges to draft orders will necessitate some basic computer and printer technology in court. There are also training implications for judges.

*Non-represented cases.* Where there are no lawyers involved in a case (and no third-party substitutes such as a lawyer for the children), the evidence suggests that hearings are most

likely to work where the judge takes on a fully inquisitorial role (see Section 4.4 above) and becomes an active problem-solver for the parties. In a fully developed model, this would mean the court, in addition to all the things above:

- Identifying the issues in dispute.
- Actively seeking agreement in the courtroom where appropriate by eliciting positions, looking for common ground and attempting to broker a settlement.
- Identifying the evidence needed to resolve remaining contested issues.
- Determining and arranging interim measures.
- Ensuring the necessary evidence is obtained, which may be from the parties themselves, but might also require commissioning expert reports or alcohol/drug/DNA testing and obtaining police disclosure.
- In final hearings giving a very strong steer or taking over cross-examination from the LIPs, to give both LIPs a fair opportunity to ask questions, and to prevent either party from being harassed or intimidated by direct cross-examination by the other.

Again, the adoption of such a model would require more judicial time and training, and may also require the court or Cafcass directly to commission testing services and to engage directly other agencies for evidence-gathering purposes. At magistrates' court level, much of the active role would fall to the legal adviser, with the lay bench as ultimate decision-maker.

### **Provide a lawyer**

Even with the modifications suggested above, there would remain a group of litigants for whom the family justice system would not work well. That is, no matter how much support is provided by the judge and even if the judge adopts a fully inquisitorial role, the LIP would not be able to participate effectively and/or the court would not be able to obtain all the evidence necessary to dispose of the case fairly. The LIPs in this situation would be those who are very vulnerable or disordered, and those with complex financial cases, as identified in Sections 2.5-2.6 above and in Section 4.4 as 'out of their depth LIPs', and some "hot potato" hearings' where the LIP's disruptiveness is attributable to drug, alcohol or mental health problems. Zorza argues that "For those who cannot access even a simplified system without a lawyer, and cannot afford a lawyer, society must find a way to subsidize the lawyers needed" (2009:542).

While the research team do not see any viable alternative to public funding for these cases, such LIPs ought to be considered for eligibility under the 'exceptional cases' category defined by Section 10 of the LASPO Act – that is, whether they are individuals to whom it is necessary to make legal services available in order to avoid a breach of their rights under

article 6 (right to a fair trial), article 8 (right to respect for family life), or Protocol 1 article 1 (right to protection of property) of the European Convention on Human Rights.<sup>111</sup>

The Impact Assessment published alongside the LASPO Act highlighted the difficulty in estimating the number of exceptionally funded cases as each case would be assessed on its individual merits. It further stated that ‘the actual number of successful applicants to the exceptional funding scheme may differ from that assumed’<sup>112</sup>. The number of grants of exceptional case funding in family law to date has been very low.<sup>113</sup> Some bodies have expressed views about the application process established by the Legal Aid Agency. The Joint Committee on Human Rights considered that the scheme is not operating as envisaged (Joint Committee on Human Rights 2013: 43-43), and the Conclusions reported from the Family Justice Council’s 2014 conference included a call to revise the guidance to caseworkers on the application of the scheme.<sup>114</sup>

In the absence of revised legislation resulting in grants of exceptional case funding more in line with the estimated level of such grants,<sup>115</sup> the researchers would suggest the introduction of a process whereby referrals or applications for exceptional case funding may be made directly from the family court to the Legal Aid Agency where a judicial officer is of the opinion that legal representation is necessary to ensure the protection of the individual’s human rights. There are a number of instances in which judges have called upon the Legal Aid Agency to provide funding.<sup>116</sup> By virtue of their ability to observe the capacity of individual LIPs to represent themselves in court (as well as their role as authoritative interpreters of the Human Rights Act 1998), family judges are uniquely well-placed to assess whether the failure to provide legal services would be a breach of the individual’s Convention rights.

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<sup>111</sup> Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 10. For discussions of circumstances in which legal aid may be required to avoid a breach of human rights, see Miles (2011a, 2011b), Miles et al (2012) and Hunter (2011).

<sup>112</sup> The Royal Assent Impact Assessment on the proposed scope changes to legal aid (July 2012).

<sup>113</sup> In the year April 2013-March 2014, 821 applications for exceptional case funding were made in the area of family law; nine of which were granted: Ministry of Justice (2014b: 27).

<sup>114</sup> *Family Law* (May 2014) 686-87. See also Cobb (2014:646-47). In the case of *Gudanaviciene and others v Director of Legal Aid Casework and another* [2014] EWHC 1840 (Admin), the Lord Chancellor’s guidance with respect to exceptional case funding was declared unlawful in setting too high a threshold. Although the decision was made in an immigration case it applies the guidance generally, beyond that specific category of cases.

<sup>115</sup> The Royal Assent Impact Assessment on the proposed scope changes to legal aid (July 2012) anticipated that up to 5% of financial provision matters and up to 5% of private Children Act matters taken out of scope by the LASPO reforms would be re-admitted under the exceptional cases route. These figures are based on estimates.

<sup>116</sup> See most recently *Re B (A Child) (Private law fact-finding – unrepresented father)*, *D v K* [2014] EWHC 700 (Fam); *Q v Q* [2014] EWFC 7.



Finally violent, aggressive and disruptive LIPs, although observed relatively infrequently in this study, created disproportionate difficulties for the courts and opposing parties. These were the remaining ‘hot potato’ hearings identified in Section 4.4, in which judges’ main strategy was to adjourn in the hope that the LIP would obtain legal representation. Such cases may also be likely to include a need for substance testing where allegations of substance abuse are contested, police disclosure and fact-finding hearings – all made more difficult by the absence of legal representation – and potentially, direct cross-examination by the LIP of the ex-partner whom he has abused.

In these situations, the researchers would suggest the availability of some form of publicly funded legal assistance to perform a protective function for the court, the other party and any children involved. This could take several possible forms. The appointment of a guardian and children’s lawyer in such cases would address difficulties with evidence gathering and provide a buffer between the violent/aggressive LIP and the other party, but the lawyer would not be in a position directly to control the LIP’s behaviour and it would be left to the judge to prevent abusive cross-examination. Alternatively, a scheme for court-appointed legal representatives operates in criminal law, and could be adapted for family law proceedings,<sup>117</sup> although this scheme presents some ethical difficulties,<sup>118</sup> and there is also no guarantee that the LIP would cooperate with their appointed legal representative. The direct provision of a legal representative to the violent/aggressive party would be mostly likely to obviate all of the problems identified, although it would need to be made clear that this provision was made in the interests of justice. Thus, as with ‘exceptional’ cases based on human rights grounds, there could usefully be some role for judicial recommendation in these cases, where the judge finds it impossible to make progress due to the LIP’s behaviour.

## 6.5 Recommendations

This report has identified that LIPs have considerable needs for support across several dimensions. It has also identified what the researchers consider to be best practices for meeting those needs, based on the team’s review of the literature and the observations and interviews with LIPs and family justice system professionals. It has not been part of the research team’s brief, however, to analyse the cost-benefit of these proposals or to produce a fully worked-up blueprint for change. This section, therefore, summarises the broad recommendations arising from the team’s analysis of the literature and the research data.

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<sup>117</sup> <http://www.barcouncil.org.uk/for-the-bar/practice-updates-and-guidance/guidance-on-the-professional-conduct-of-barristers/court-appointed-legal-representatives/>.

<sup>118</sup> *Ibid.*

Further detailed policy and operational consideration will of course be required to determine how these recommendations could be implemented.

### **Information needs**

- That all relevant family justice communications, including forms, leaflets, practice directions, templates and pro forma, are re-evaluated from the perspective of LIPs and (if necessary) redesigned with their various needs in mind.
- That a single authoritative 'official' family court website is established with all the resources that a LIP needs in one place.
- That the court's communication with parties prior to the first hearing is used more effectively to convey important information to LIPs.
- That judges are encouraged to give LIPs clear verbal instructions and guidance on process and procedure.
- That the court service provides increased opportunity for face-to-face inquiries with relevant court staff and that guidelines and training for court staff are devised to facilitate information-giving whilst avoiding giving advice.

### **Emotional/moral support**

- That there is a presumption that a single family member, friend or volunteer may accompany a LIP in court to offer emotional/moral support without the need to submit a formal CV.
- That consideration is given to the development of a code of conduct, practice guidance or regulatory framework for paid/'professional' McKenzie Friends.

### **Practical support and legal knowledge**

- That initial legal advice to facilitate dispute resolution and, where necessary, for initial preparation for court proceedings is made universally available.
- That providing support for LIPs in a consistent way in both semi-represented and non-represented cases is understood as a key element of the judicial role; and that judicial officers receive appropriate guidance and training to do so.
- That measures are introduced to ensure greater availability of and access to exceptional case funding in private family law matters.
- That a mechanism is introduced to enable judicial recommendation for the provision of publicly funded representation in the interests of justice.

- That the MoJ consider which other forms of legal and procedural assistance outlined in this Chapter for LIPs engaged in court proceedings can feasibly be supported or implemented.

### Other issues

- Follow up independent research is needed to examine the impact of the legal aid reforms on the types and experiences of LIPs, their impact on the court system and the effectiveness of innovations and services to support LIPs.

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## Glossary

**Acknowledgement of service:** the form returned by the respondent to a divorce petition, acknowledging that he or she has been served with the petition and responding to it as appropriate (e.g. admitting adultery, indicating willingness to pay costs, indicating approval or not of proposed arrangements for any dependent children).

**Approval hearing:** A short hearing which may be required in financial remedy cases in which the parties are requesting a 'consent order' enshrining their agreed settlement of the case, where a judge has some concerns about the proposed order and wishes to see the parties to be satisfied that they have both given their informed consent to it.

**Bundle:** A collection of documents relevant to the conduct of a hearing, including application forms and orders, statements, affidavits and reports. Responsibility for preparation of the bundle normally rests with the applicant. Copies of the bundle should be provided in advance of the hearing to the court and to the other parties.

**C100:** The form used to apply for, vary or discharge a residence, contact, prohibited steps, or specific issue order in Children Act matters

**Cafcass:** Children and Family Court Advisory and Support Service. Cafcass is a non-governmental public body with a statutory function in family proceedings to safeguard and promote the welfare of children, including by giving advice to the court, making provision for children to be represented and providing information, advice and other support for children and their families in proceedings.

**Children Act cases.** Cases to determine arrangements for children's care and upbringing. In this study the cases are 'private law' matters where parents are in dispute about the child's upbringing, rather than 'public law' cases where the dispute is between a parent and the state/local authority. The relevant legislation is the Children Act 1989.

**Consent order:** An order of the court which enshrines the agreement which the parties have reached to settle the case. Consent orders may be submitted to the court to make a formal order without any other court proceedings, in which case a judge will normally read and approve them on the papers, although if the judge has concerns they may require an 'approval hearing'. Alternatively, where the parties reach agreement at court in the course of

proceedings (usually brokered by their lawyers), the lawyers will draft a consent order reflecting the agreement and present it to the judge for approval.

Contested hearing: A hearing where the parties have not been able to reach agreement and each side must present their case before a judge for adjudication.

D81: This is the Statement of Information form which parties are generally required to complete in applying for a consent order in financial remedy cases. It provides the judge with summary information about the parties' financial and personal situations, and any supporting information that the parties wish to communicate to the judge in order to explain the proposed order.

Directions hearing: A hearing to decide what actions should be taken to progress the case, as distinct from a final hearing where the court decides the outcome of the application.

Fact finding hearing (FFH): A hearing where a judge is invited to make findings on allegations relating to past behavior, for example, whether alleged incidents of domestic violence occurred. A FFH usually occurs as the first part of a 'split hearing' where any findings of fact can then inform the subsequent handling of the case.

Family Help (Lower) /Family Help (Higher): These are two classes of legal aid funding. The former class of funding permits the solicitor to provide ongoing assistance with a dispute that might otherwise result in litigation; such work can be done without the prior approval of the legal aid authorities. The latter class of funding authorizes the solicitor to conduct litigation on behalf of the client, covering preparatory work, representation in court and ongoing efforts to negotiate a settlement; such work can only be undertaken with prior approval – and certification – by the legal aid authorities. Further approval by the legal aid authorities is required for the grant of Legal Representation, funding all work undertaken in connection with a contested Final Hearing (see below).

FDA: First Directions Appointment. This is the first hearing in a financial remedy case. It is a procedural hearing designed to identify what further evidence is required and to set a timetable for the case.

FDR: Financial Dispute Resolution appointment. A meeting designed to afford the parties an opportunity to negotiate a settlement and forestall the costs and delay associated with a Final hearing. The parties should have made full disclosure by this point. The judge conducting the

FDR may give an 'indication' of the likely outcome of a final hearing if the case were to proceed, in order to give the parties some guidance in settling their case. That judge will then have no further involvement in the case.

FHDRA: First Hearing Dispute Resolution Appointment. This is the first hearing in a Children Act case. Its purpose is to identify any safeguarding issues (which should have been checked by Cafcass prior to the FHDRA), any issues that can be resolved by agreement and to determine any evidence requirements and a timetable for the case for matters that remain in dispute.

Final hearing: The last hearing in a contested case, in which the parties have failed to settle the dispute and so require adjudication.

Financial order: The order which deals with the division of matrimonial assets, principally on divorce. It may require the transfer of property, the sale of property, the sharing of pension funds, the making of periodical payments etc –. See also 'financial remedy cases', below.

Financial remedy cases: Cases concerning the division of matrimonial assets upon nullity, separation or divorce (all in relation to marriage/civil partnerships only, not unmarried couples). Formerly known as 'ancillary relief'. The relevant legislation is the Matrimonial Causes Act 1973 (and equivalent Parts of the Civil Partnership Act 2004).

FM1: The FM1 form informs the court about the parties' compliance with the Practice Direction which requires them to attend a MIAM before commencing court proceedings, unless they have a specified reason for not doing so. Submission of an FM1 form is expected but not mandatory. The requirement to attend a MIAM will be given a legislative basis with the enactment of the Children and Families Bill 2013.

Form E: Form E is the statement for a financial order in contested financial remedy proceedings. It is a long and comprehensive document where the parties state disclose all the details of their respective financial positions.

FPC: Family proceedings court. The name given to the Magistrates' Court when dealing with family cases.

Interim hearing: A hearing held part way through a case in order to deal with issues such as contact in a provisional way, pending a final hearing.

Judicial officer: A term encompassing a judge, deputy judge, legal adviser (also known as Clerk to the Justices) or a lay magistrate.

LIP: Litigant in person. Also known as a self-represented party.

LASPO: the Legal Aid, Sentencing and Punishment of Offenders Act 2012. The relevant parts of this Act, which came into force on 1 April 2013, removed most family law proceedings from the scope of legal aid provision.

Maintenance pending suit: This is a type of periodical payment (regular income payment) that may be ordered in financial remedy cases to support one spouse pending the determination of that case.

McKenzie Friend: A lay person who provides support to a litigant in person at a court hearing and/or in preparation for a court hearing. The term encompasses informal support provided by friends and family members, as well as more formally arranged support provided by a member of a third-sector organization or even a paid provider of McKenzie Friend services. McKenzie Friends are not normally permitted to address the court or question witnesses during a hearing. Litigants in person have a right to receive reasonable assistance from a McKenzie Friend but should approach a judge formally before exercising this right in accordance with the 2010 Practice Guidance: McKenzie Friends (Civil and Family Courts).

MIAM: Mediation information and assessment meeting. A meeting where a mediator will explain the mediation process to an individual and assess whether mediation is suitable in their case.

Petition: The application to court made by the 'petitioner' for a divorce to be granted.

Review hearing: A hearing at which the judge will review the case, in particular the success or otherwise of arrangements put in place following a previous hearing.

Rights of Audience: Refers to the right to appear before and address a court and to call and examine witnesses. A court may confer rights of audience upon a McKenzie Friend but only if it is persuaded that there is a good reason to do so and special circumstances exist (2010 Practice Guidance: McKenzie Friends (Civil and Family Courts)).

Scott Schedule: A case management tool used commonly in fact finding hearings to identify allegations that a judge must make findings upon. The Scott Schedule sets out in tabular form a list of allegations and the responses to those allegations.

Special guardianship: A special guardianship order provides for the long-term placement of a child with a non-parent and confers parental responsibility on that carer or carers. Unlike adoption, however, special guardianship does not sever the child's legal relationship with their birth family.

Unbundled services: A set of discrete tasks that may be performed by a lawyer under a partial retainer agreement. This is distinct from a full retainer model where the lawyer performs all legal tasks from instruction to completion of the case. Examples of unbundled services might include drafting or checking a document or providing advice on a specific topic or stage of a case.

## Appendix A

### Research methodology in detail

The project specification issued by the Ministry of Justice called for a primarily qualitative study based on observations of hearings and interviews with parties and professionals. The fieldwork was to be undertaken prior to the implementation of legal aid reform in April 2013. The specification set out a detailed list of aims and research questions as follows:

#### Aims and Research Questions

- The research study must develop our understanding of the range of litigants in person in private family law cases, their behavioural drivers and support needs, and their impact on the court system. The findings will provide a qualitative base of the experiences and support needs of litigants in person prior to legal aid reform.

There were three main aims of the research:

- **To map the range of litigants in person (LIPs) and their behavioural drivers.** Key research questions include:
  - What are the characteristics of LIPs and their cases?
  - What are the reasons behind their self-representation?
  - Have they had legal representation at any stage of their case?
  - To what extent do LIPs participate in court proceedings and what are their reasons for this?
  - What expectations are held by LIPs about the court process?
  - What are the experiences of different types of LIPs, ranging from passive to actively participating in proceedings, in court?
  - How do LIPs perceive representing themselves affected their case outcome?
- To develop our understanding of the **support needs of litigants in person.** Key research questions include:
  - What problems or difficulties do LIPs experience and at what stage of the process do they encounter these?
  - What are the support needs of LIPs?

- How are these needs assessed prior and during the court process by judges and other professionals?
  - To what extent do LIPs seek and use legal advice during the course of their case, at what stages and from whom?
  - What support services are LIPs aware of?
  - What support services do LIPs use, how do they access them and do they meet their needs?
  - What support services are judges and other professionals aware of, use or signpost for LIPs and to what extent do these meet their needs?
- To explore how the range of litigants in person **impact on the court**. Key research questions include:
    - To what extent, and how do cases involving different types of LIPs impact on the effectiveness, length and number of hearings?
    - To what extent, and how do different types of LIPs impact on the workload of the court?
    - How do judges and other professionals involved in cases with LIPs support LIPs during court proceedings?

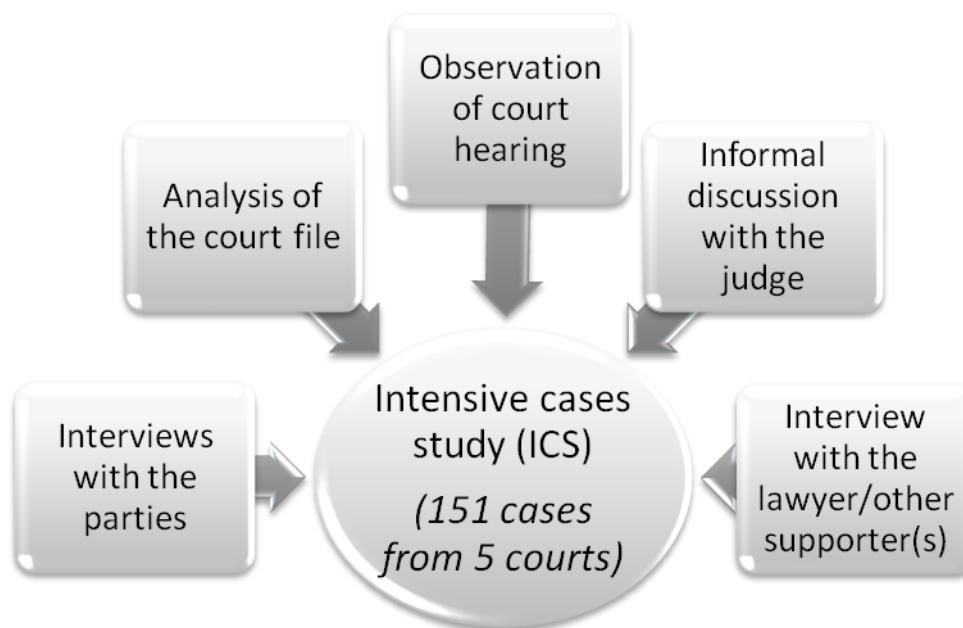
The study design followed the specification closely. It comprised three linked studies (see diagram A.1 below for a graphical summary):

- *Intensive Cases Study* (ICS). The largest element of the research involved detailed analysis of a sample of 151 cases heard in five courts over a three to four week data collection time frame in each court between January and March 2013. The approach was multi-perspectival, involving observation of the hearing in each case, interviews with the parties and professionals associated with the observed case (subject to consent and availability) and scrutiny of the court file. The observation sample included cases with none, one or both parties represented.
- *Local Contextual Study* (LCS). This involved a series of focus groups in each of the five courts with local stakeholders (judges, lawyers, Cafcass and court staff), interviews and observations with local LIP support organisations and observations of public areas such as court counters and waiting rooms. The LCS took place in the same five courts as the ICS.

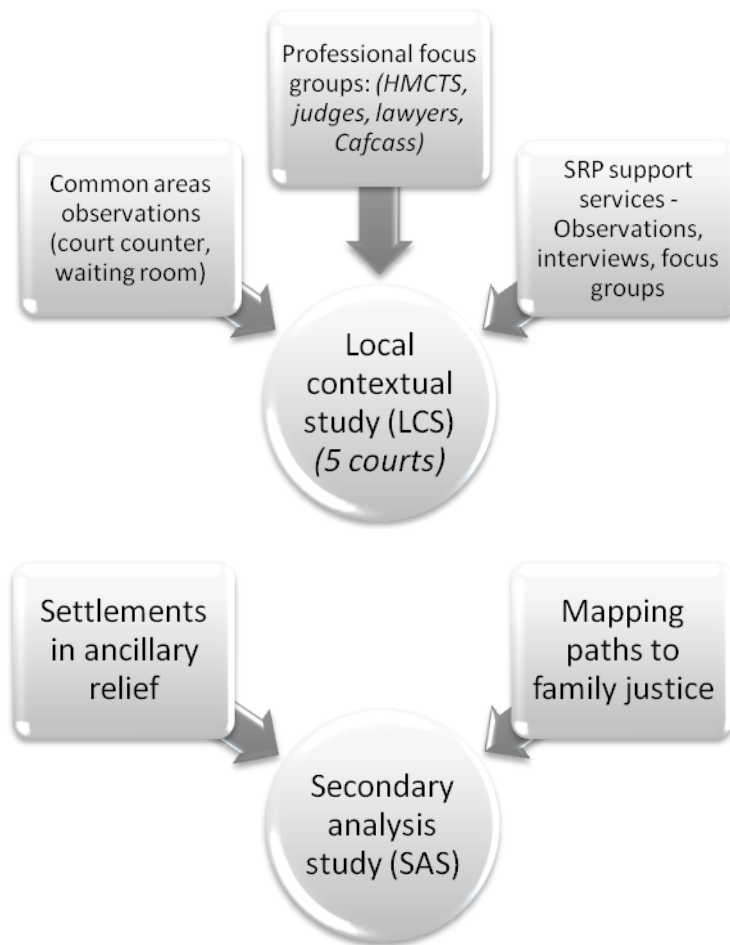
- *Secondary Analysis Study (SAS)*. This involved secondary analysis of data relating to LIPs from two current studies led by members of the research team (see Appendices B and C for detail of these two studies).

The three complementary studies were intended to provide the most robust means of addressing the specified research questions within the three month period available for fieldwork. The Intensive Cases Study grounded the analysis in a detailed and multi-layered understanding of what had occurred in individual cases. The Local Contextual Study took a broader and longer-term perspective on court processes and stakeholder perspectives and experiences that might be overlooked in a case-specific analysis. The secondary analysis of the two additional datasets was designed specifically to provide further material within which to contextualise the research data gained from the five local courts included in the ICS and LCS. Thus the three studies provided three complementary vantage points from which to address the research questions – the individual case, the court and the family justice system context.

**Diagram A1. The Three Component Research Studies**







## A.1 The ICS and LCS Samples

### Sampling criteria

The tender document required that the sample for the observational study included the full range of experiences of different types of LIP in different private law family case types from a range of courts. It is important to note that the sample was not intended to be statistically representative, but rather to reflect the types of cases involving LIPs. Specifically, the tender required that the observations included the following:

- Case type: Section 8 orders under the children Act 1989 (contact and residence applications, prohibited steps, specific issue), private law special guardianship applications and ancillary relief cases. The sample was also to include cases involving multiple or cross-applications and cases involving multiple adult parties.
- Mix of representation: including the LIP as either an applicant or respondent, cases where all parties are self-represented, and cases with only represented

parties. The sample should include partial representation cases where a party has had some prior legal advice or representation.

- Participation in case: a range of cases involving inactive to active self-represented parties. This will include observations of cases where an inactive self-represented party is absent from court proceedings.
- Characteristics of self-represented parties: cases involving self-represented parties from a range of key demographic characteristics, including socio-economic groups and indicators of vulnerability.
- Court type: family proceedings courts, county courts and the family division of the high court.<sup>119</sup>

To meet the sampling targets the research team approached five courts (A-E) to participate in the study as the source for both the Intensive Cases Study and the Local Contextual Study samples. As Table A.1 indicates, these reflected a mix of court type, local socio-economic profile and cultural diversity. The five courts were drawn from five different circuits in England and Wales. All five courts approached by the research team agreed to participate in the study.

**Table A.1 Court characteristics**

	<b>COURT A</b>	<b>COURT B</b>	<b>COURT C</b>	<b>COURT D</b>	<b>COURT E</b>
<b>Court type</b>	County	County/FPC	County/FPC	County	County/FPC
<b>Socio-economic</b>	Lower	Mixed	Lower	Mixed including higher	Mixed
<b>Cultural diversity</b>	Greater	Greater	Lower	Greater	Lower
<b>Geographic</b>	City	City	Town	City	Town/rural

In order to achieve the overall target of 150 cases of different types for the Intensive Cases Study,<sup>120</sup> with a sub-target of 30 cases from each court, the team adopted a funnelled selection strategy. The fieldwork began in Court B in early January 2013. In the first week the fieldwork team sought to observe as many cases as possible listed on each day, although prioritising any cases with at least one LIP.<sup>121</sup> Fieldwork was then extended to Courts C, D

<sup>119</sup> The Family Division of the High Court was ultimately excluded from the study for logistical reasons.

<sup>120</sup> The team had estimated that approximately 150 cases could be observed within the timeframe.

<sup>121</sup> See Table A.2 in Appendix A for the individual characteristics of each observed case, listed by court.

and E. At each court the fieldwork team worked with court staff to identify LIP cases each day. Again the priority was to observe all possible LIP cases whilst also including some full representation cases to enable comparison. Towards the middle of the fieldwork in Courts B, C, D and E the fieldwork team became more selective in sample recruitment and sought to actively prioritise the LIP case and hearing types that were less well-represented in the whole sample, such as final hearings and financial remedy and non-represented cases. By the time the data collection started in Court A the team had decided that data saturation point had been reached in relation to fully represented cases. In Court A, therefore, the team collected only two fully represented cases to check consistency with prior findings, but otherwise focused entirely on LIP cases. Court A also includes a higher proportion of financial remedy cases as the team purposively sampled these to balance out the large numbers of children cases elsewhere in the sample.

The achieved sample of 151 observed cases is therefore a purposive sample, designed to incorporate sufficient numbers of different types of LIP case as required by the tender document. In general the team's approach started with trying to sample *all* possible LIP hearings within a particular timeframe at a particular court and only at the end actively prioritising particular types of LIP case.

The resulting sample was therefore broadly based in line with the sampling criteria. It is important to note that it is not a 'convenience' sample, based in a single court or provided by a small number of judges, which might tend to produce a more homogenous sample; nor was it reliant upon groups of lawyers or litigants, possibly with extreme or atypical views, self-selecting into the sample and therefore introducing significant bias. Rather in this sample, the researchers approached all or most LIP cases within the timeframe. The ability to include all LIP cases was limited by two factors. First were the logistics of having only two researchers available in each location whilst multiple lists could be running concurrently. The second was the need to gain consent from all parties prior to entering the hearing. In practice the logistical difficulties of getting to speak to potential participants were a more common reason for non-inclusion than the relatively rare refusal of consent. Given the broadly-based nature of the sample, therefore, in places the report includes some indication of the comparative weighting of various groupings within the sample. For example in Section 5.4 the report notes that most LIPs in the sample did not proactively seek information and advice prior to the hearing and in Section 2.3 it observes that most LIPs in the sample were not self-representing by choice. These references to the varying proportions of groups are included to help understand the nature of the sample as context for the qualitative findings. They also give some *broad* indication of the relative (but not absolute) sizes of the various groupings

that might feature in the wider court population. Such indications would, of course, need to be tested with a larger representative sample.

### The Achieved Sample – Intensive Cases Study

The final achieved sample of 151 cases included the following representation types, court level, family law area and hearing type:

- *Representation type:* fully (both or all parties) represented 37 (25%), semi-represented 74 (49%), neither/none represented 37 (25%) (with 3 LIPs appearing *ex parte* where the other party's representation status was unclear).
- *Family law area:* s.8 Children Act (69%), financial remedy (28%), special guardianship (1%), other (2%).
- *Court level:* FPC 46 (30%), County Court 105 (70%).
- *Hearing type:* First hearing (26%), Directions (34%), FDR (7%), Review (9%), Approval (2%), Other contested (Interim, Finding of Fact, MPS) (4%), Final (18%).

Table A.2 below sets out the case characteristics for each of the 151 cases.

The researchers reiterate that this was a purposive sample designed to have sufficient numbers of the range of types of cases. It was not designed as a representative sample and so cannot be used to draw statistical conclusions. That said, the final achieved sample is broadly based and does meet all the sampling criteria. In several respects it does also broadly reflect the pattern of cases within the family courts. The balance in the sample between private law children (i.e. s8 orders), special guardianship and financial remedy cases does broadly reflect the distribution of these cases at national level, with a preponderance of children cases and very few special guardianship cases. The Judicial Statistics for the first quarter of 2013 indicate that there were somewhat more applications for private law children matters in England and Wales than for financial remedies, at 13,625 and 10,258 respectively. However, significantly fewer financial remedy cases reach court than in children matters. The Judicial Statistics record that 65% of financial remedy disposals in Q1 2013 were uncontested meaning that the parties would not usually attend a court hearing.<sup>122</sup> A further 26% were initially contested but subsequently consented, leaving just 9% of

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<sup>122</sup> Although the court still has the power to require parties to attend an 'approval hearing' if there are concerns about the fairness, or otherwise, of a draft consent order. The sample did include a few examples of such hearings.

adjudicated outcomes. Similarly, the numbers of private law special guardianship applications was very small. In Q1 2013 there were 513 applications for the whole of England and Wales.

In terms of representation type, national statistics for England and Wales are only available for private law children matters, not financial remedy. For Q1 2013 47% of these cases were fully represented, 42% semi-represented and 11% non-represented. Moorhead and Sefton (2005: 25-26) found 48% of their family cases sample involved at least one litigant in person, while it was relatively uncommon for both parties to be in person (less than 10% of their sample). The sample reflects the preponderance of semi-represented cases in the family courts but the researchers also over-sampled non-represented cases to ensure that there were sufficient examples to draw conclusions from the sample.

There is relatively little national data on hearing type, although it is clear that the preponderance of first and directions hearings in the sample reflects the balance of the workload in the family courts where relatively few children or financial remedy cases proceed to a contested hearing, particularly a contested final hearing. Hunt and Macleod's large court-file based analysis of contact cases found that only 30% of their sample had any type of contested hearing and only 11% of the total sample reached a contested final hearing (2008: 167). A similar pattern is evident in financial cases. It was noted above that only 9% of cases were adjudicated. Hitchings, Miles and Woodward's analysis of financial settlements provides further evidence that few financial remedy cases have multiple hearings. In their sample of 114 cases that reached court, 69% had only one or two hearings (2013: 63-4).

The sample of 151 cases therefore is not a representative sample but it is broadly based and reflects in broad terms the distribution of cases within the family justice system. It was not a convenience sample where individual courts or judges volunteer to facilitate access to a confined group of cases, or where individual lawyers or litigants, possibly with quite atypical views or experiences, volunteer to take part in a study. As a consequence, where appropriate the report does indicate in broad terms the distribution of cases within the sample. Thus, the discussion of how proactive LIPs were in seeking information does indicate that only a minority of LIPs in this sample were very proactive. This figure cannot be directly extrapolated to the wider LIP population as a specific proportion as it is not based on a representative sample. However, some indication of distribution gives added value to the purely qualitative analysis, and it is appropriate given the relatively large size of this qualitative sample and the sampling strategy adopted that involved approaching most if not all LIP cases for inclusion in the study for the major part of the sampling period.

**Table A.2 The Intensive Cases Study sample, by case characteristics and data sources**

Case ID	Matter	Court type	Hearing type	Repn type (by case)	Attendance at hearing	Litigation duration	App interview	Resp interview	Other interviews	Lawyer interview	Judicial officer	Court file
A001	Financial	County	Final	Semi (intvnr LIP)	Both/all			Yes (Rep)	Intervenor (LIP)	App's counsl	Yes	Yes
A002	Children	County	First	Fully rep	Both/all							Yes
A003	Children	County	First	Semi (resp LIP)	Both/all			Yes (LIP)		App's sol		Yes
A004	Children	County	First	Semi (resp LIP)	Both/all	Children in 2011			Cafcass	App's sol		Yes
A005	Financial	County	MPS	Fully rep	Both/all					App's counsl		Yes
A006	Children	County	Review	Semi (resp LIP)	Both/all	3 years	Yes (Rep)			App's sol, child's sol		Yes
A007	Children	County	First	Semi (resp LIP)	Both/all		Yes (Rep)			App's sol		Yes
A008	Children	County	Final	Semi (Child rep)	Both/all	4 years	Yes (LIP)		Cafcass	Child's sol	Yes	Yes
A009	Children	County	Directions	Non-rep	Both/all	Children in 2009	Yes (LIP)	Yes (LIP)				Yes
A010	Children	County	Directions	Semi (app LIP)	Both/all	5 years	Yes (LIP)	Yes (Rep)			Yes	Yes
A011	Children	County	Directions	Semi (app LIP)	Both/all		Yes (LIP)					Yes
A012	Children	County	Directions	Non-rep	App only		Yes (LIP)					Yes
A013	Children	County	Directions	Semi (resp LIP)	Both/all					Resp's sol		Yes
A015	Financial	County	First	Semi (resp LIP)	Both/all	Children		Yes (LIP)				Yes
A016	Financial	County	First	Semi (app LIP)	Both/all	Prev. children	Yes (LIP)					Yes
A017	Children	County	Directions	Semi (resp LIP)	Both/all			Yes (LIP)			Yes	Yes
A018	Children	County	Directions	Semi (resp LIP)	Both/all							Yes
A019	Children	County	Directions	Semi (resp LIP)	Both/all	Multiple reviews		Yes (LIP)	McF for resp			Yes

Case ID	Matter	Court type	Hearing type	Repn type (by case)	Attendance at hearing	Litigation duration	App interview	Resp interview	Other interviews	Lawyer interview	Judicial officer	Court file
A020	Financial	County	Directions	Non-rep	Both/all	15 years FLA, PHA, CA, CSA	Yes (LIP)				Yes	Yes
A021	Financial	County	First	Semi (resp LIP)	Resp only	4 years		Yes (LIP)			Yes	Yes
A022	Children	County	First	Semi (resp LIP)	Both/all		Yes (Rep)	Yes (LIP)	McF for resp			Yes
A023	Financial	County	Final	Semi (resp LIP)	App only		Yes (Rep)		McF for resp	App's counsl		Yes
A024	Financial	County	First	Semi (resp LIP)	Both/all		Yes (Rep)					Yes
A025	Financial	County	First	Semi (resp LIP)	Both/all					App's sol		Yes
A026	Children	County	Directions	Semi (resp LIP)	Resp only	8 years		Yes (LIP)				Yes
A027	Children	County	Directions	Non-rep	Resp only						Yes	Yes
A028	Children	County	Directions	Semi (resp LIP)	Both/all						Yes	Yes
A029	Financial	County	Final	Semi (resp LIP)	Both/all			Yes (LIP)		App's counsl	Yes	Yes
A030	Children	County	Final	Semi (resp LIP)	Both/all	children in 2011		Yes (LIP)	McF for resp		Yes	Yes
A031	Children	County	First	Non-rep	Both/all		Yes (LIP)	Yes (LIP)				Yes
B001	Children	FPC	Directions	Semi (app LIP)	Both/all	Long-running	Yes (Rep)	Yes (LIP)				Yes
B002	Children	FPC	First	Fully rep	Both/all	Prev. proceedings						Yes
B003	Children	County	Final	Semi (resp LIP)	Both/all			Yes (LIP)				Yes
B004	Children	County	Directions	Fully rep	Both/all	8 years						Yes
B005	Children	FPC	Directions	Non-rep	App only		Yes (LIP)					Yes
B011	Children	FPC	Directions	Semi (resp LIP)	Resp only			Yes (LIP)				Yes
B012	Children	FPC	Directions	Fully rep	Both/all							Yes

Case ID	Matter	Court type	Hearing type	Repn type (by case)	Attendance at hearing	Litigation duration	App interview	Resp interview	Other interviews	Lawyer interview	Judicial officer	Court file
B013	Children	FPC	Directions	Fully rep	Both/all							Yes
B014	Children	FPC	Directions	Fully rep	Both/all							Yes
B015	Children	County	Directions	Fully rep	Both/all							Yes
B021	Children	FPC	Directions	Non-rep	Both/all			Yes (LIP)				Yes
B022	Children	FPC	First	Non-rep	Both/all		Yes (LIP)	Yes (LIP)				Yes
B023	Children	FPC	Directions	Fully rep	Both/all							Yes
B031	Children	County	Review	Fully rep	Both/all						Yes	Yes
B032	Children	FPC	Final	Non-rep	App only		Yes (LIP)					Yes
B033	Children	FPC	Review	Non-rep	Both/all		Yes (LIP)	Yes (LIP)				Yes
B034	Children	FPC	Interim	Semi (resp LIP)	Both/all			Yes (LIP)		App's sol and counsl		Yes
B035	NMO	FPC	First	Non-rep	App only		Yes (LIP)					No
B050	Children	FPC	Directions	Non-rep	Both/all		Yes (LIP)	Yes (LIP)				Yes
B051	Children	FPC	Directions	Semi (app LIP)	App only							Yes
B052	Children	FPC	Directions	Non-rep	Both/all							Yes
B053	Financial	County	FDR	Fully rep	Both/all					Yes		Yes
B054	Children	County	Directions	Semi (resp LIP)	Both/all			Yes (LIP)		App's sol		Yes
B055	Financial	County	FDR	Fully rep	Both/all					App's sol, Resp's sol		Yes
B056	Financial	County	Final	Non-rep	App only	Prev. children					Yes	Yes
B057	Financial	FPC	Review	Non-rep	App only		Yes (LIP)					Yes



Case ID	Matter	Court type	Hearing type	Repn type (by case)	Attendance at hearing	Litigation duration	App interview	Resp interview	Other interviews	Lawyer interview	Judicial officer	Court file
B058	Children	FPC	Directions	Semi (resp LIP)	Both/all			Yes (LIP)				Yes
B059	Financial	County	Directions	Non-rep	App only		Yes (LIP)					Yes
B060	Financial	County	Final	Semi (resp LIP)	Both/all			Yes (LIP)	Intervenor (Rep); McF for resp	Intervenor's counsl		Yes
B061	Financial	County	Approval	Non-rep	Both/all		Yes (LIP)	Yes (LIP)				Yes
B062	Financial	County	Approval	Semi (resp LIP)	Both/all		Yes (Rep)					Yes
B063	Financial	County	Final	Non-rep	Both/all		Yes (LIP)	Yes (LIP)			Yes	Yes
C001	Children	County	Directions	Non-rep	Both/all		Yes (LIP)	Yes (LIP)				Yes
C002	Children	FPC	Directions	Non-rep	Resp only			Yes (LIP)				Yes
C003	Children	FPC	Directions	Semi (resp LIP)	Both/all	2 years		Yes (LIP)		App's sol		Yes
C004	Children	FPC	First	Fully rep	Both/all							Yes
C005	Children	FPC	Directions	Semi (resp LIP)	Both/all		Yes (Rep)			App's sol		Yes
C006	Children	FPC	First	Semi (app LIP)	Both/all		Yes (LIP)					Yes
C007	Children	FPC	First	Fully rep	Both/all							Yes
C008	Children	County	Directions	Fully rep	Both/all	Prev. children	Yes (Rep)	Yes (Rep)				Yes
C009	Financial	County	FDR	Fully rep	Both/all							Yes
C010	Children	County	Interim	Fully rep	Both/all					App's counsl		Yes
C011	Children	FPC	Final	Fully rep	Both/all							Yes
C012	Children	FPC	Final	Non-rep	Both/all	6 years	Yes (LIP)	Yes (LIP)				Yes
C013	Children	FPC	Directions	Fully rep	App only							Yes
C014	Children	FPC	Directio	Fully rep	Both/all							Yes

Case ID	Matter	Court type	Hearing type	Repn type (by case)	Attendance at hearing	Litigation duration	App interview	Resp interview	Other interviews	Lawyer interview	Judicial officer	Court file
			ns									
C015	Children	FPC	Directions	Fully rep	Both/all							Yes
C016	Children	FPC	Directions	Semi (resp LIP)	Both/all			Yes (LIP)		App's sol	Yes	Yes
C017	Children	County	Directions	Semi (app LIP)	Both/all		Yes (LIP)		Cafcass		Yes	Yes
C018	Children	County	Review	Non-rep	Both/all			Yes (LIP)			Yes	Yes
C019	Financial	County	Directions	Semi (resp LIP)	Resp only	Prev. £		Yes (LIP)		App's sol		Yes
C020	Children	County	Final	Semi (app LIP)	Both/all	3 years	Yes (LIP)				Yes	Yes
C021	Children	County	Final	Semi (app LIP)	Both/all		Yes (LIP)			Child's sol		Yes
C022	Children	FPC	Review	Semi (app LIP)	Both/all		Yes (LIP)			Resp's sol	Yes	Yes
C023	Financial	County	Final	Semi (resp LIP)	Both/all	2 years		Yes (LIP)				Yes
C024	Children	FPC	Final	Non-rep	App & Rsp 1		Yes (LIP)	Yes (LIP)				Yes
C025	Children	County	Final	Non-rep	Both/all		Yes (LIP)	Yes (LIP)			Yes	Yes
C026	Children	County	Final	Non-rep	Both/all		Yes (LIP)	Yes (LIP)				Yes
C027	Financial	County	First	Semi (resp LIP)	Both/all		Yes (Rep)			App's sol	Yes	Yes
D001	Cont. divorce	County	Directions	Non-rep	Resp only						Yes	Yes
D002	NMO	County	First	Semi (resp LIP)	App only							Yes
D003	Children	County	Directions	Non-rep	App only	Prev. children	Yes (LIP)					Yes
D004	Financial	County	FDR	Fully rep	Both/all							Yes
D005	Financial	County	Final	Semi (resp LIP)	Both/all	Multiple proceedings		Yes (LIP)	McF for resp	App's counsl	Yes	Yes
D006	Children	County	First	Fully rep	Both/all							Yes
D007	Children	County	First	Fully rep	Both/all	+ £						Yes
D008	Financial	County	FDR	Semi rep (intervenor LIP)	Both/all							Yes
D009	Children	County	First	Semi (resp LIP)	Both/all	Prev.	Yes (Rep)			App's sol		Yes

Case ID	Matter	Court type	Hearing type	Repn type (by case)	Attendance at hearing	Litigation duration	App interview	Resp interview	Other interviews	Lawyer interview	Judicial officer	Court file
						children and £						
D010	Children	County	First	Semi (app LIP)	Both/all	Several children	Yes (LIP)	Yes (Rep)		Resp's sol	Yes	Yes
D011	Children	County	First	Fully rep	Both/all	Cross-app						Yes
D012	Children	County	First	Fully rep	Both/all	Cross-app						Yes
D013	Special Guardianship	County	Final	Non-rep	Both/all		Yes (LIP)	Yes (LIP)	LA social worker(s)			Yes
D014	Financial	County	First	Non-rep	App only		Yes (LIP)					Yes
D015	Children	County	First	Non-rep	App only	3 years + collateral	Yes (LIP)					Yes
D016	Special Guardianship	County	Final	Semi (2 <sup>nd</sup> rsp LIP)	Both/all							Yes
D017	Children	County	Review	Non-rep	Both/all	2 years	Yes (LIP)	Yes (LIP)				Yes
D018	Children	County	Review	Semi (app LIP)	Both/all	Prev. children and £	Yes (LIP)					Yes
D019	Children	County	Directions	Non-rep	Resp only	2 years		Yes (LIP)				Yes
D020	Children	County	Final	Semi (Child rep)	Both/all	3 years				Child's counsl		Yes
D021	Children	County	Directions	Fully rep	Both/all			Yes (Rep)	McF for resp			Yes
D022	Children	County	Other contested (FFH)	Fully rep	App only							No
D023	Children	County	Final	Semi (resp LIP)	App only	2 years						Yes
D024	Children	County	First	Semi (resp LIP)	Both/all			Yes (LIP)	McF for resp			Yes
D025	Financial	County	Final	Semi (resp LIP)	Both/all			Yes (LIP)		App's sol		Yes
D026	Children	County	Review	Semi (resp LIP)	Both/all	Children over 10 years		Yes (LIP)				Yes

Case ID	Matter	Court type	Hearing type	Repn type (by case)	Attendance at hearing	Litigation duration	App interview	Resp interview	Other interviews	Lawyer interview	Judicial officer	Court file
D027	Financial	County	FDR	Semi (intvnr rep)	Both/all	3 years				Intvnr's sol	Yes	Yes
D028	Children	County	Directions	Semi (app LIP)	Both/all	Prev. £		Yes (LIP)				Yes
D029	Financial	County	Directions	Semi (intvnrs LIP)	Both/all	3.5 years		Yes (Rep)	Intervenors (LIPs) x 3	App's counsl		Yes
D030	Financial	County	Final	Semi (app LIP)	Both/all	£ in 2008, 2009 + children						Yes
D031	Financial	County	FDR	Semi (app LIP)	Both/all	Divorce + FLA	Yes (LIP)			Resp's counsl	Yes	Yes
E001	Children	FPC	Directions	Fully rep	Both/all							Yes
E002	Children	FPC	First	Semi (resp LIP)	Both/all			Yes (LIP)	McF for resp			Yes
E003	Children	FPC	First	Non-rep	Both/all		Yes (LIP)					Yes
E004	Children	FPC	Review	Fully rep	Both/all							Yes
E005	Children	FPC	Other contested (interim)	Fully rep	Both/all							Yes
E006	Children	FPC	Directions	Semi (resp LIP)	Both/all			Yes (LIP)				Yes
E007	Children	County	Review	Semi (2 <sup>nd</sup> resp LIP)	Both/all		Yes (Rep)	Yes (Rep); 2 <sup>nd</sup> resp (LIP)				Yes
E008	Financial	County	Final	Semi (resp LIP)	Both/all			Yes (LIP)		App's sol	Yes	Yes
E009	Children	FPC	First	Semi (resp LIP)	Both/all			Yes (LIP)	McF for resp		Yes	Yes
E010	Children	FPC	First	Non-rep	Both/all						Yes	Yes
E011	Financial	County	FDR	Semi (resp LIP)	App only						Yes	Yes
E012	Children	County	First	Non-rep	Both/all	Prev. children	Yes (LIP)					Yes

Case ID	Matter	Court type	Hearing type	Repn type (by case)	Attendance at hearing	Litigation duration	App interview	Resp interview	Other interviews	Lawyer interview	Judicial officer	Court file
E013	Children	County	Directions	Fully rep	Both/all	Prev. children						Yes
E014	Children	County	First	Semi (resp LIP)	Resp only		Yes (Rep)	Yes (LIP)		App's sol		Yes
E015	Financial	County	Approval	Semi (resp LIP)	Both/all			Yes (LIP)				Yes
E016	Financial	County	Directions	Semi (app LIP)	App only	CSA liability	Yes (LIP)					Yes
E017	Financial	County	Directions	Fully rep	Both/all							Yes
E018	Children	FPC	Final	Non-rep	App only			Yes (LIP)				Yes
E019	Children	County	First	Non-rep	Both/all	Protracted children						Yes
E020	Children	County	Directions	Semi (resp LIP)	Resp only	2.5 years		Yes (LIP)				Yes
E021	Financial	County	FDR	Fully rep	Both/all					App's counsl		Yes
E022	Children	County	Review	Semi (resp LIP)	App only							Yes
E023	Children	County	First	Semi (resp LIP)	Both/all			Yes (LIP)		App's sol		Yes
E024	Financial	County	First	Semi (resp LIP)	Both/all							Yes
E025	Financial	County	MPS	Semi (resp LIP)	Both/all		Yes (Rep)			App's sol	Yes	Yes
E026	Children	County	Review	Fully rep	Both/all							Yes
E027	Financial	County	FDR	Fully rep	Both/all							Yes
E028	Children	FPC	Review	Semi (resp LIP)	App only		Yes (Rep)			App's sol		Yes
E029	Children	FPC	First	Non-rep	Both/all						Yes	Yes
E030	Children	FPC	Directions	Semi (resp LIP)	Both/all						Yes	Yes
E031	Children	FPC	First	Fully rep	Both/all						Yes	Yes

## Data sources – intensive cases study and local contextual study

For each of the 151 cases in the intensive cases study the research team sought to obtain multiple perspectives on the needs and experiences of LIPs and their impact on other parties, professionals and the court system as a whole. This was done by triangulating data sources as far as possible, subject to consent and logistics. In each case one or more of the research team observed the hearing including, where possible, observations of the interactions between the parties and any lawyers involved before the hearing. The research team also analysed the court file for each case to understand the issues being litigated, the trajectory of the case and to access any independent reports, e.g. the safeguarding report prepared by Cafcass in children cases.<sup>123</sup>

The researchers also attempted to interview the parties and professionals involved in each of the 114 LIP cases to get their perspective on the process and outcome. It was not feasible to also interview parties and professionals in the full representation cases. However, the data strategy did require interviews with represented parties and lawyers in semi-represented cases, giving us insight into the experience both of being represented and representing clients. In total 117 interviews were conducted with parties from the 114 LIP cases.<sup>124</sup> The 117 party interviews included 97 LIPs and 20 represented parties as follows:

- Unrepresented applicants 39
- Represented applicants 15
- Unrepresented respondents 54
- Represented respondents 4
- Unrepresented intervenors 4
- Represented intervenors 1

The research team sought to interview both or all adult parties in all LIP cases. This was not always possible due to the non-attendance of a party, lack of consent for interview at approach or at subsequent contact or the logistics of the researcher(s) being unable to manage competing data collection tasks in fast-moving lists. Despite those challenges, at least one adult party was interviewed in 82% of the 114 LIP cases. The breakdown was as follows:

- 0 parties interviewed: 21 cases (18% of LIP cases)
- 1 party interviewed: 57 cases (50%)

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<sup>123</sup> See following section for details of the data collection instruments used in the study.

<sup>124</sup> A further three interviews were conducted with parties (1 applicant, 2 respondents) in three full representation cases.

- 2 parties interviewed: 34 cases (30%)
- 3 parties interviewed: 2 cases (2%)

In addition to the observation of the hearings where possible the researchers also conducted interviews with the professionals and other supporters associated with each of the 114 LIP cases. The numbers of professional and supporter interviews were as follows:

- Judges: 33 (29% of LIP cases).
- Lawyers: 38<sup>125</sup> (including 8 applicant's barristers, 19 applicant's solicitors, 1 respondent's barrister, 4 respondent's solicitors, 1 children's barrister, 3 children's solicitors, 1 intervenor's barrister and 1 intervenor's solicitor).
- Other professionals: 4 (1 family court advisor, 2 children's guardians and 1 local authority social worker).
- McKenzie Friends, informal supporters: 10 (including 1 paid McKenzie Friend).

Taken together, in 90% of LIP cases the data sources included the observation of the hearing, scrutiny of the court file and at least one interview with a party or professional. In more than half (52%) of LIP cases the team conducted two or more interviews in addition to the observation and court file analysis. The distribution of data sources for all 114 LIP cases was as follows:<sup>126</sup>

- Observation + court file: 11 cases (10%).
- Observation, court file + one interview: 42 cases (37%).
- Observation, court file + two interviews: 34 cases (30%).
- Observation, court file + three interviews: 20 cases (18%).
- Observation, court file + four interviews: 5 cases (4%).

In addition to the 151 observed cases selected for the Intensive Cases Study, the research included separate professional focus groups with Judges, Lawyers, Court Staff and Cafcass in each of the five courts for the Local Contextual Study. As Table A.3 indicates, the total number of focus groups attendees across the five areas included 21 judges, 33 lawyers, 31 court staff and 26 Cafcass officers and managers.

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<sup>125</sup> An additional interview was conducted with a barrister in a full representation case.

<sup>126</sup> In two LIP cases either the court file was missing or observation was not permitted. The data sources for those cases were the court file and a single interview or the observation and a single interview. See Table A.2 above for details of data sources for each case.

In addition to the professional focus groups, the researchers also observed the common areas (entrances, waiting rooms etc) in each court. In two courts there was a local branch of the Personal Support Unit, and the team observed their operations and conducted interviews with their staff.

**Table A.3 Number of focus group attendees by court and professional group**

	COURT A	COURT B	COURT C	COURT D	COURT E	Total
<b>Judges</b>	1 group of 5 district judges (DJs)	1 group of 2 DJs +1 single DJ	1 group of 3 DJs	1 group of 4 DJs + 1 group of 2 DJs + 1 single DJ	1 group of 3 DJs	21
<b>Lawyers</b>	5 barristers	5 solicitors	5 solicitors	1 group of 8 + 1 group of 4 barristers	6 solicitors	33
<b>Court staff</b>	6 (clerk, counter, listings, usher)	5 (clerk, admin, listings, manager)	7 (clerks, listings, usher, manager)	7 (clerks, admin, listings, usher)	4 (listing, usher, managers)	31
<b>Cafcass</b>	5 FCAs	5 FCAs + 2 managers	3 FCAs	6 FCAs	5 managers	26

Overall the research team were confident that they achieved a sufficiently large sample of observed cases that broadly reflected the workload of the family courts. The combination of observation, case file analysis and interview and focus groups with all the key stakeholders provided a rich, multi-layered perspective on the range of LIPs, their behavioural drivers and support needs and their impact on the court system.

**A.2 Forms of data collection**

Instruments were devised for each of the various methods of data collection.

**Observation of hearings**

Researchers completed an individual Data Collection Booklet (DCB) for each observed case. This included sections designed to be completed during the hearing:



- basic information about the case – a series of tick boxes on matter type, hearing type, court level, judicial officer, gender of applicant/respondent, representation, attendance of parties and any supporter.
- hearing timings – start time, end time, adjournment number and length, overall court time.
- layout of the court and seating positions.

The researcher observer took free form notes of the hearing itself, guided by a list of possible topics contained in the DCB:

- Pre-hearing activity.
- Entering the court room.
- Openings.
- Presenting the case.
- Applicant's points/issues.
- Respondent's points/issues.
- LIP's (apparent) understanding of what is going on.
- Relevance of contributions.
- Communication issues.
- Cross examination.
- Emotions and behaviour.
- Judicial strategies.
- Lawyer strategies.
- McKenzie friends/other supporters.
- What works?
- Standard pathways/processes.
- Outcome from hearing.
- Any other issues?

### **Case file analysis**

The research team analysed the court file for each of the observed cases. The team devised a case file analysis tool with the following sections:

- General characteristics of parties.
- Any evidence of vulnerability or safety issues.
- FM1.

- Procedural events and dates in the case (financial remedy cases).
- Procedural events and dates in the case (children Act/SGO cases).
- Previous children applications and outcome.
- Adjournments and vacated hearings.
- Representation and public funding.
- Other legal disputes between the parties.
- Communication/participation difficulties.
- Additional communication on file between parties and the court.
- General reflection on the file.

### **Interviews with parties and professionals**

The linked interviews with the parties and professionals were conducted at court after the hearing where possible or by phone at a later date. The interviews were designed to be relatively short – about 20-30 minutes maximum. These interviews were audio recorded and transcribed. The research team also had permission to conduct informal interviews or post-hearing discussions with judicial officers about the observed case. Where this was done the researchers took written notes rather than recording these interviews.

The interview guide for parties varied slightly depending upon whether the interviewee was a LIP in a semi or non-represented case or had been represented. The main topics covered were:

- Reason for representation/lack of representation today and previously.
- Attempts to settle the case out of court.
- Experience of the hearing (cf expectations, understanding, having your say/being heard).
- Any difficulties/any advantages.
- Information and advice before court. Readiness.
- Any changes to improve the process generally.

The interview guide for lawyers (observed cases) covered:

- Reason for other side's non-representation.
- Any previous legal help or advice.
- Initial reaction to other side being unrepresented.
- Impact on pre-court negotiations or correspondence?
- Impact on outcome.

- Role in hearing in semi-representation case.
- Experience of LIPs in court – preparation, participation, understanding.
- Effectiveness of judges in ensuring efficient and just hearing.
- LIP’s general understanding of next steps.
- Impact of LIP on representation of your client.
- Views on McKenzie Friends.
- Impact of LIPs on court system.
- Support needs of LIPs.
- Changes needed.

## Focus groups

The research team devised topic guides for each of the professional focus groups. The topic guides contained similar material for each of the groups but with some adaptation to address issues of particular relevance to the professional group. All focus groups were audio recorded and transcribed.

### **Cafcass focus group topic guide**

- Types of LIPs and motivations for LIP. Likely changes post April.
- Impact on pre-hearing work (i.e. Schedule 2 inquiries).
- Role at court if one/both LIP.
- LIP preparation, participation, understanding, willingness to negotiate/settle.
- Equality of arms.
- Impact on the report-writing process.
- Impact on number/length of hearings.
- Impact on Cafcass, court system as a whole.
- Information and support needs.
- Any other issues.

### **Court staff focus group topic guide**

- Numbers and types of LIPs.
- How encounter LIPs.
- Impact on tasks/workload:
  - dealing with correspondence
  - listing cases
  - at court on the day of hearings

- in the court room
- drawing up orders after hearings
- dealing with outcomes
- Information and advice needs (stages, circumstances).
- What HCMTS staff can/can't do to help LIPs through the court system:
  - Information about options, vs advice what to do
  - Training and/or guidance on dealing with LIPs
- Sources of information, advice or support for LIPs.
- Suggestions for changes/adaptations.
- McKenzie friends.
- Other locally-relevant issues identified by researchers during field work.
- Any other issues.

#### **Judicial focus group topic guide**

- Problems or difficulties and at what stage.
- Support needs.
- Assessing needs.
- Support services and signposting.
- Impact on judicial role, hearing and case length, court system generally, represented party.
- Strategies to ensure equality of arms and make efficient use of court time.
- Hearing processes:
  - entering the room
  - explanations /terminology
  - ensuring understanding of the parties
  - evidence: presenting their own and cross-examination
  - drafting orders
  - McKenzie Friends
- Any other issues.

#### **Lawyer focus group topic guide**

- Types of LIPs and motivations for LIP. Likely changes post April.
- Initial reaction to other side being unrepresented.

- Impact on pre-court negotiations or correspondence?
- Role in hearing in semi-representation case.
- Experience of LIPs in court – preparation, participation, understanding.
- Impact on outcome.
- Effectiveness of judges in ensuring efficient and just hearing.
- LIPs' general understanding of next steps.
- Impact of LIP on representation of your client.
- Impact of LIPs on court system – number/length hearings.
- Effects on lawyers, court staff, judges, court system.
- Support needs of LIPs.
- Views on McKenzie Friends.
- Changes needed.
- Any other issues.

### **A.3 Access and ethics**

The research is on a sensitive topic and involves parties who are involved in live court proceedings. Particular care was therefore required in ensuring that the research was conducted to the highest ethical standards. Approval for the research was sought and obtained from:

- The Research Ethics Committee of the School of Social Sciences and International Studies at Exeter University.
- Data Access Panel (DAP) for access to the courts and a Privileged Access Agreement to access court files.
- The Judicial Office/President of the Family Division to conduct the study and to interview judges.
- Cafcass Research Governance Committee to run focus groups with Cafcass staff
- The Ministry of Justice to review and approve all fieldwork instruments.

The researchers conducted site visits at each of the five courts prior to the start of fieldwork to agree a specific local protocol for the fieldwork within the framework set out in the various applications for access and ethical approval.

Participation in the project was on the basis of informed consent and anonymity of court, case and individual. Observation of a hearing was conditional upon securing the informed consent of the judicial officer and the parties. The research team sought approval from

judges at the start of each observation day. The approach to the parties was court specific. In four courts this was done by being introduced to the parties by the usher prior to the hearing and offering a verbal explanation of the research as well as an information sheet. The hearing was observed if both parties and the judge gave their consent. In one court the judge explained the research to the parties and checked their consent. The parties were asked to sign a consent form prior to taking part in an interview after the hearing. An example of the litigant leaflet and consent form is given below. Similar leaflets and consent forms were devised for the professional interviews and focus groups.

## **EXAMPLE OF AN INFORMATION LEAFLET AND CONSENT FORM FOR LITIGANTS:**

### **A study of family law cases with and without a lawyer**

We are researchers carrying out a study of what happens when people come to court with family law cases, whether they have a lawyer or not. The Judicial Office has given us permission to observe cases in court today if you are willing. We would also very much like to talk to you as part of our research and we have prepared this leaflet to give you some information about it.

#### **What is the study about?**

Most people who come to court about a family law issue use a lawyer but some people represent themselves or use a different source of support. The purpose of this study is to find out what the court process is like when people are in these different situations.

#### **Who is in charge of the study?**

The Judicial Office has given us permission to carry out this research at the court. The study is funded by the Ministry of Justice (MoJ) which is the government department responsible for the courts. However, the research team is independent and we are not part of the court system.

The research team is led by Professor Liz Trinder from Exeter University. She has many years of experience of research on separating families' experiences of the legal system. Two other researchers will be helping with the study at Birmingham. They are Emma Hitchings and Kay Bader. They have been fully trained and also have a lot of experience of research in this area.

### **Why are we doing this research?**

The MoJ have asked us to carry out this research so they can learn more about the reasons why some people represent themselves in court while others use a lawyer, and about the difference that using or not using a lawyer makes to the court proceedings. The research will help the MoJ to understand whether anything needs to change to help self-represented parties to use the courts effectively.

We need to observe as many family law cases as possible so that we can see for ourselves what court hearings are like both when people have a lawyer at court and when people are representing themselves. It is also important that we speak directly to some of the people involved in the cases we observe so that we can understand what it is like to be in court..

### **How you can help us**

For this research to be useful and to influence future changes, we need to find out as much as we can about the personal experiences of people like you. We would like to be able to observe your case hearing today and, if possible, to talk with you about your experience after the hearing has finished.

Please note, it is entirely your choice whether to do an interview with us after your hearing and you may also request that we do not observe your case. *Your decision either way will not influence what happens with your case at all.*

### **What will taking part in the research involve?**

Observing the hearing means that one or both researchers will be sitting quietly in the court room. They'll be watching to see how the hearing process works whether there is a lawyer or not. They will make written notes but they won't record any names or other identifying details. If you don't want to have your hearing observed then do let one of the researchers or the judge know and the researchers will not observe the hearing.

If you are willing, one of the researchers will arrange to talk with you about your experience of preparing to bring your case to court and of the court process itself. If you are able to stay behind for a short while after your hearing, we can speak with you then in a private space at the court. If you have to leave straight away after the hearing, the researcher can do an interview with you over the phone in the next few days. The interview will take up to 20 minutes. With your permission, we would like to audio record the interview so that the interviewer is free to listen carefully to what you are saying. If you do change your mind about taking part in the study at any point then just let us know and we will withdraw you from the study.

We are able to offer all interviewees a £10 gift voucher to thank you for the time given to the research.

### **Confidentiality**

What is said to the research team will remain strictly confidential. The researchers will not record any names or addresses in their notes and if you agree to an audio recording of your interview, we will make sure that no names or identifying details will be transcribed. Nobody from outside of the research team will be able to identify you from any comments you make to us. Neither you nor your case will be identified in the research report.

### **Any questions or worries?**

If you would like more information about the research then do ask one of the researchers, Emma Hitchings or Kay Bader, at court. They will be very happy to help. If you have any questions about the research at a later date then please contact Liz Trinder who is leading the research study:

Professor Liz Trinder, School of Law, Exeter University, Devon, EX4 4RJ, Tel 01392 723375, email [e.j.trinder@exeter.ac.uk](mailto:e.j.trinder@exeter.ac.uk)

If you have any other concerns about how the research is being conducted and would like to speak to an independent person then please contact:

Professor Debra Myhill, Director of Research College of Social Sciences and International Studies, [D.A.Myhill@exeter.ac.uk](mailto:D.A.Myhill@exeter.ac.uk)





A study of family law cases with and without a lawyer  
Exeter University

CONSENT TO PARTICIPATE IN AN INTERVIEW

I agree to be interviewed about my experiences of being at court. I understand that this interview is part of a study to look at the experience of having or not having a lawyer in family cases.

The researcher has explained to my satisfaction the purpose of the study and how the information will be used.

I have read the information leaflet.

I understand that everything I say will be treated in strict confidence and no comments identifying me or my household will be disclosed outside of the research team. I understand that my personal details will not be shared with anybody outside the research team. The data will not be used for any purpose other than the research and third parties will not be allowed access to the data (except as may be required by the law). My data will be held in accordance with the Data Protection Act. It will be held on an anonymous basis for five years and then destroyed.

I understand that I am able to withdraw from the study at any time (for example if I am uncomfortable with any questions) by telling the researcher, or after the interview, by contacting Liz Trinder using the contact details above.

*Name of interviewee:*.....

*Signature:* .....

*Phone: [only needed for phone interviews]* .....

*Date*.....

*Signature of researcher*.....

## A.4 Data analysis

The data collection resulted in a large and complex data set comprising quantitative, quantifiable and wholly qualitative data from multiple sources and perspectives. The quantitative/quantifiable data derived from the hearing observation timings and case file analysis was analysed using descriptive and bivariate statistics.

The bulk of the data was in the form of qualitative fieldwork notes and interview and focus group data. The approach to the qualitative analysis varied to some degree depending upon the research question being addressed. The profiling of the characteristics of LIPs (Chapter 2) was driven by a structured approach to code and classify qualitative data, referring to and developing from categories found in the existing literature on litigants in person.. In contrast, the material on the support needs and experiences of LIPs (Chapter 5) and the pre-court (Chapter 3) and in the hearing (Chapter 4) sections was analysed by using an inductive thematic approach. The typology of working and not working hearings was generated inductively using a constant comparative method described in section 4.4 above.

In order to speed the analysis, a data collection booklet (DCB) for each case was completed during the data collection phase. The DCB included a complete set of data relating to the case, including basic information about the case (i.e. case and hearing type, LIP type etc) the observation notes and analysis, the case file data and space to summarise key points from interviews with parties and professionals involved in the case. The DCB also included a set of free text boxes for the observer to complete to provide a ready summary of the case and to flag features of the case that might be particularly relevant to analysis, whether to demonstrate typical features or as an unusual or deviant case. The free text boxes were:

- What is the case about? What are the main issues?
- What can we learn about the types of LIPs from this case?
- What can we learn about the support needs of LIPs from this case?
- What can we learn about the impact of LIPs on the courts or court processes from this case?
- Any other comments or relevant features that might inform the analysis?

The team chose not to use computer assisted qualitative data analysis software such as NVivo as previous experience suggested that it would be too unstable with such a large dataset, especially with multiple users. The analysts relied instead on standard word processing software and printed out transcripts.

## Appendix B

# Characteristics of unrepresented and represented parties

### **Explanatory notes for Tables B1 and B2 below.**

*Matter.* Whether an application under the Children Act 1989 (i.e. for contact, residence, specific issues, prohibited steps or parental responsibility), for a financial remedy or for another kind of order. The 'Other' category includes applications for special guardianship, contested divorce or a non-molestation order under the Family Law Act 1996.

*Role and Status.* Refers to the litigant's role in proceeding, whether as applicant, respondent or intervenor. Status refers to the litigant's family role as it pertains to the index proceedings, e.g. husband in financial proceedings, father in Children Act proceedings.

*Reason for LIP.* Parties were able to suggest one or more reasons for self-representation or it could be inferred from the court file or from the interview with the other party or their lawyer. 'Above the LA threshold' refers to cases where there was firm evidence that ineligibility for legal aid was means-related. 'Not eligible for LA' refers to cases where lack of eligibility was related to means or merit or a combination of both (see further section 2.3 of the report). 'DK' is used when the reason for self-representation could not be determined.

*Legal help.* This column captures the nature and extent of any previous legal advice or representation in the current or any previous proceedings (see further section 2.4 of the report).

*Complexity.* Refers to features of the case that render it more complex, for example, evidential requirements such as DNA or drug testing or pension-sharing, jurisdictional issues and involvement of multiple parties or other agencies (see further section 2.5 of the report).

*Vulnerability.* Refers to physical, psychological and social characteristics of the litigant that might render them more vulnerable in a court context and diminish their ability to represent themselves and their interests. Information about vulnerability was derived from analysis of the court file (including the Cafcass safeguarding letter in Children Act cases), observation of the hearing and any interviews with the parties or representatives. Where the only source of information was one or other of the parties, the term 'alleged' is used. (See further section 2.5 of the report). References to mental health conditions are based on reports from professionals (recorded in the case file or in interview) or self-report from the party concerned.

*Capacity.* Refers to the ability of the litigant to understand the procedural and substantive issues in the case and their capacity to follow the necessary procedures and represent their

interests. Capacity may reflect particular vulnerabilities or the unfamiliarity with legal proceedings or any inherent complexities of the substantive law or court process. Assessment of capacity was drawn primarily from the observation of the hearing, supplemented by any interviews and information on the court file (see further section 2.5 of the report).

*Problems for the court.* Includes problematic behaviour observed by the researchers during the hearing, non-attendance and refusal to engage with the court process, and non-meritorious and serial applications. This information was drawn from observations, analysis of the court file and interviews with both LIPs and opposing parties or their lawyers (see further section 2.6 of the report).

*Funding of representation* (in Table B.2). This indicates whether represented parties were self-funded or legally-aided (or where the source of funding for representation was unknown). Information on funding status was derived either from the court file or from interviewing the party, their lawyer or the opposing party.

*Continuing legal aid eligibility* (in Table B.2). The research team undertook an assessment of whether any of the forms of evidence required to be eligible for legal aid after 1 April 2013 were present on the court file or disclosed in interviews with parties or legal representatives. 'Not eligible' is used where this could be determined with a reasonable degree of certainty; 'no evidence of eligibility' is used where no evidence was present but the possibility that such evidence might exist could not be excluded; 'likely still eligible' refers to cases where some form of evidence was present; 'n/a' is used where the party was self-funding and therefore the issue of their eligibility for legal aid post-LASPO would not arise (see further section 6.1 of the report).

**Table B.1 Characteristics of litigants in person (listed by individual litigant)**

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
A001	Children	Intervenors	Paternal GPs	Cost: can't afford lawyer	Partial: legal advice at earlier stages; help from H's sols with paperwork	Intervenors; overseas property	Both in fragile health	Limited understanding of procedure or substantive law; unable to articulate their case	
A003	Children	Resp	Mother	Difficulties with LA: pending outcome of application	Partial: in/out of court	DNA testing needed	Victim of violence; alleged drug and alcohol abuse	Confident, calm, able to participate effectively	Evading service; no-shows at hearings; non-cooperation with testing
A004	Children	Resp	Father	Difficulties with LA: eligible but unwilling/  unable to organise representation	Wholly	Local Authority involvement	ADHD; mental health issues; alcohol abuse [extensive criminal record]	Affected by alcohol; unable to participate effectively	Very difficult, aggressive and shouting in hearing; Cafcass felt unsafe
A006	Children	Resp	Mother	Choice: dispensed with representation	Partial: had LA sol in earlier stages	Local Authority and police involvement; FFH on allegations of child sexual abuse; Guardian appointed	Mental health problems, mainly depression	Can't distinguish relevant from irrelevant	Obstructive, preventing Guardian from seeing child

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
A007	Children	Resp	Mother	Choice: simple matter	Wholly	Local Authority involvement	Alcoholic		
A008	Children	App	Father	Cost: above LA threshold + Choice: prefer to represent self	Almost wholly; had direct rep barrister for one hearing	Guardian appointed; s37 report		Heavily reliant on sol for Guardian who prepared bundle, led case and brokered agreement; litigation by correspondence	
A008	Children	Resp	Mother	Cost: not eligible for LA	Partial: had LA sol in earlier stages but lost eligibility	Guardian appointed; s37 report	Alleged victim of rape by F; very distressed by thought of contact – will need therapy to help cope	Heavily reliant on sol for Guardian who prepared bundle, led case and brokered agreement; litigation by correspondence	Previous no-shows; previous challenging behaviour in court
A009	Children	App	Father	Choice: lack of trust in system + Cost	Partial: had sol for financial proceedings			Educated, articulate, but procedurally challenged	
A009	Children	Resp	Mother	Choice: trust in Cafcass and court + Cost: above LA threshold	Partial: had sol for financial proceedings		F very controlling	Educated, articulate, but procedurally challenged	
A010	Children	App	Father	Choice: feels able to handle	Partial: in/out of court	Guardian appointed		Litigation by correspondence	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
				himself					
A010	Children	Resp	Mother	Difficulties with LA: pending outcome of LA application	Partial: pro bono sol at one hearing	Guardian appointed	Alleged victim of violence; can't face F alone	Litigation by correspondence; avoids communication with F	Tendency to get frustrated and 'lose it' in court
A011	Children	App	Father	Cost: not eligible for LA	Partial: in/out of court			Ill-prepared: no pen or paper; frustrated by process	
A012	Children	App	Maternal GPs	Choice: not want to pay lawyers + Cost: not eligible for LA	Wholly	Local Authority involvement		Prev refused to speak with M's sol; haven't sought any information or advice; litigation by correspondence	Unmeritorious application
A012	Children	Resp	Father	DK	Wholly	Local Authority involvement	Alleged drug abuse		No-show
A012	Children	Resp	Mother	Difficulties with LA	Partial: previously had LA sol	Local Authority involvement	Alleged victim of violence and control		No-show
A013	Children	Resp	Mother	Difficulties with LA: not yet obtained funding	Partial: represented in previous proceedings		Psychiatric illness; Aspergers; ADHD	Very limited: no apparent understanding of proceedings, not rational; no communication with F	Highly inappropriate behaviour in court

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
A015	Financial	Resp	Husband	Cost: exhausted private funds	Partial: represented in children proceedings, and advice on MPS			Wary about speaking to W's sol: feels vulnerable	
A016	Financial	App	Husband	Cost: not eligible for LA + Choice: simple matter	Partial for chn: in/out of court; wholly for financial			Procedurally challenged	
A017	Financial	Resp	Mother	Cost: above LA threshold + Choice: not want to pay for lawyer	Partial: had sol at earlier stages			Confident, competent, calm, prepared; but procedurally challenged	
A018	Children	Resp	Mother	Cost: above LA threshold	Wholly		Alleged victim of violence	Competent, calm, collected	
A019	Children	Resp	Mother	Cost: above LA threshold	Partial: prev had LA sol but no longer eligible		Alleged victim of violence		
A020	Financial	App	Husband	Choice: not want to pay lawyer	Partial: had sol at earlier stages	Court's jurisdiction to hear application; combining PHA application with financial proceedings		Complete lack of awareness of law and procedure; no communication with W	Vexatious application, serial applicant



Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
A020	Financial	Resp	Wife	DK	DK	Court's jurisdiction to hear application; H trying to combine PHA application for damages with financial proceedings	Facing serial, harassing applications; very anxious, exhausted; victim of harassment	No communication with H	
A021	Financial	Resp	Husband	Cost: unable to afford + Choice: prefers to handle himself	Partial: had sol at earlier stages			Litigation by correspondence	
A022	Children	Resp	Mother	Difficulties with LA when changed sols	Partial: prev had LA sol; advice out of court by new sol		Victim of violence and control; intimidated by F		
A023	Financial	Resp	Husband	Cost: above LA threshold	Wholly	Third party seeking charging order over H's share of FMH		Doesn't feel has ability to rep self; leaving it to court to make decision	No-show; not cooperating with proceedings
A024	Financial	Resp	Husband	Cost: above LA threshold	Partial: had sol for divorce and some advice on finances	Transfer of Housing Assocn tenancy requires court order; pension splitting		Procedurally challenged re paperwork	
A025	Financial	Resp	Husband	Difficulties with LA: pending outcome of LA	Partial: in and out of LA; sol	Pension splitting; need to instruct	Alcohol problem	Affected by alcohol in court; refused to	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
				application	done paperwork	actuary		speak to W's sol	
A026	Children	Resp	Mother	Cost: above LA threshold	Partial; had sol at earlier stages		Subject to repeated harassing applications by F; victim of violent attack by F	Procedurally challenged; doesn't know how to apply to stop F making further applications without permission; wary of speaking to F's sol: feels vulnerable	
A027	Children	App	Mother	DK	Partial: had sol at earlier stages	Local Authority involvement – core assessment	Alleged mental illness and alcohol abuse; victim of violence		No-show, not for the first time
A027	Children	Resp	Father	Choice: prefers to rep self, poor experience with lawyers	Wholly	Local Authority involvement – core assessment		Appears reasonably competent	
A028	Children	Resp	Father	Choice: lack of trust in system	Wholly		Alleged drug abuse, mental health issues [criminal record + prosecutions pending]		Hostile, physically intimidating, aggressive; has been no-show previously
A029	Financial	Resp	Husband	Difficulties with LA when changed sols	Partial: prev had LA sol		Fearful and emotional; stressed by proceedings	Procedurally challenged; no understanding of Form E; no financial disclosure;	Evaded service; previous no-shows

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
								very distrustful of W's legal reps: refuses to communicate with them out of court	
A030	Children	Resp	Father	Cost: above LA threshold + Choice: cynical about lawyers, now has McF	Partial: had sol at earlier stages		Alleged victim of violence; emotional	Difficulty keeping emotions in check and keeping focused	
A031	Children	App	Foster carers	Cost: not eligible for LA	Partial: took some advice from a sol	Cafcass recommending s37 report			
A031	Children	Resp	Mother	DK	DK	Cafcass recommending s37 report			
B001	Children	App	Father	Cost: above LA threshold	Partial: Had LA for divorce; pro bono help with finances		Alleged mental health issues; alleged victim of abuse by M	No apparent understanding of proceedings; no communication with M's lawyer	
B003	Children	Resp	Mother	Difficulties with LA: withdrawn on merit previous week	Partial: had LA sol at earlier stages	Local Authority involvement; child placed in LA foster care	Drug abuse	Collected and competent in hearing (though outburst outside)	
B005	Children	App	Father	Cost: not eligible for LA + Choice	Partial: had sol at first hearing			Reasonably competent, confident,	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
								articulate; parties unable to communicate; litigation by correspondence	
B005	Children	Resp	Mother	Cost: not eligible for LA	Partial: in and out of representation			Parties unable to communicate; litigation by correspondence	No show
B011	Children	Resp	Mother	Cost: above LA threshold	Wholly			Found process reasonably simple	
B021	Children	App	Father	DK	Wholly				
B021	Children	Resp	Mother	Cost: above LA threshold	One-off advice from CAB sol		Alleged victim of emotional and psychological abuse	Procedurally challenged; feels 'at sea' with proceedings	
B022	Children	App	Paternal GPs	Choice: not want to pay lawyers	Wholly			Procedurally challenged	Unmeritorious application
B022	Children	Resp	Father	DK	Wholly				
B022	Children	Resp	Mother	Cost: above LA threshold	One-off advice from CAB sol			Procedurally challenged; feels 'at sea' with proceedings	
B032	Children	App	Mother	Difficulties with LA: new job, LSC required further	Partial: had LA sol at earlier		Victim of violence; limited	Has problems understanding	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
				info	stages		literacy	written materials	
B032	Children	Resp	Father	DK	DK		ADHD, ODD, learning difficulties		No-show; not engaging with process
B033	Children	App	Father	Cost: above LA threshold	Partial: in/out of court				
B033	Children	Resp	Mother	Choice: doesn't consider lawyer necessary	Wholly				
B034	Children	Resp	Mother	Cost: exhausted private funds + Choice, prefer to represent self, now has McF	Partial: rep at earlier stages		Alleged victim of violence, emotional and psychological abuse	Highly educated, articulate, effective in putting case in court; F's lawyers say very difficult to deal with out of court	
B035	Other (non-mol)	App	Female	Difficulties with LA: LSC requires further information after house move	Partial: previously rep for ex parte application		Alleged victim of violence	Extremely nervous and upset, overwhelmed, confused	Application repeatedly not served on respondent
B050	Children	App	Father	Difficulties with LA + Choice: prefer to rep self	Wholly	Local Authority involvement: care proceedings pending		Unaware of law or procedure	
B050	Children	Resp	Mother	Unable/unaware of need to	Wholly	Local Authority involvement:	Alleged alcohol abuse	Appears to have no understanding of	Repeated no-

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
				organise legal representation		care proceedings pending	[criminal convictions]	proceedings; not very coherent	shows
B051	Children	App	Father	Choice: prefers to rep self	Partial: had LA sol at earlier stage but dispensed with	Police disclosure	[Lengthy criminal history]		Very angry, verbally aggressive, intimidating; need to call security; previous no-shows
B052	Children	App	Father	DK	Wholly	FFH to be held		Well educated, appears able to conduct case fairly well, but fails to serve statement on other party	
B052	Children	Resp	Mother	DK	Wholly	FFH to be held	Alleged victim of violence	Well educated, appears able to conduct case fairly well, but fails to serve statement on other party	
B054	Children	Resp	Father	Cost: above LA threshold	Wholly	Guardian appointed	Some language difficulties; difficulty controlling emotions		
B056	Financial	App	Wife	DK	Partial: previously rep	H disappeared; need to effect	Alleged victim of violence,		

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
					for CA application and divorce	transfer of FMH in his absence	emotional and financial abuse and control: restricted autonomy		
B056	Financial	Resp	Husband	Refusing to engage in proceedings	Wholly		Facing deportation		No-show at any hearing
B057	Financial	App	Wife	Unable or unwilling to organise legal representation	Had advice from CAB		Vulnerable adult, learning difficulties	Not clear she understood what occurred at all	
B057	Financial	Resp	Husband	DK	DK				No-show, sent letter to court instead
B058	Children	Resp	Father	Difficulties with LA on change of solicitor	Partial: had sol at earlier stages		Alleged drug abuse	Apparently drug-affected during hearing; didn't understand much of what legal adviser said or when to speak; unable to manage paperwork	Erratic behaviour, constant interruptions
B059	Financial	App	Wife	DK	DK				

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
B059	Financial	Resp	Husband	DK	DK				No-show
B060	Financial	Resp	Husband	Cost: exhausted private funds	Partial: had sol at earlier stages	Large, complicated business loan; need for expert valuation of business; Intervenor	English not first language; not computer literate and no computer access; had a stroke earlier in proceedings	Procedurally challenged; poor and delayed disclosure; ill-prepared; out of depth	
B061	Financial	App	Wife	Cost: couldn't afford + Choice: simple matter	Partial: in/out of court			Well-educated, competent	
B061	Financial	Resp	Husband	Cost: couldn't afford + Choice: simple matter	Wholly		Limited English	Limited understanding of proceedings	
B062	Financial	Resp	Husband	DK	DK		Non-English speaker without interpreter		
B063	Financial	App	Wife	Cost: not eligible for LA	Wholly	Resident overseas	Aged in 70s, recovering from life-threatening illness	Well-educated, able to do own research and prepare case; but limited competence in hearing; bundles 'a mess'	
B063	Financial	Resp	Husband	Cost: exhausted private funds	Partial: had sol at earlier stages	Resident overseas	Aged in 80s	Well-educated, able to do own research and	



Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
								prepare case; but limited competence in hearing; bundles 'a mess'	
C001	Children	App	Father	Cost: above LA threshold	Partial: prev had Legal Help; paying for sol out of court	M wanted drug testing but no-one could pay so not ordered	Alleged drug abuse	Low educational level, unable to participate effectively; no communication between parties	
C001	Children	Resp	Mother	Difficulties with LA: pending outcome of application for extension of LA	Partial: prev had Legal Help, pro bono assistance from sol out of court	Wanted drug testing of F but no-one could pay so not ordered		Low educational level, did not understand court proceedings or what agreeing to; no communication between parties	
C002	Children	App	Mother	Cost: above LA threshold	DK		Alleged chaotic lifestyle, emotionally unstable		No-show and previous adjournments
C002	Children	Resp	Father	Cost: above LA threshold	Partial: paid for sol advice at outset, but couldn't afford to continue		Stressed by court proceedings	Reasonably articulate, calm, rational, but anxious about how to make case	
C003	Children	Resp	Mother	Cost: above LA threshold	Partial: had pro bono sol at earlier stage (stopped when		Victim of harassment and high level	Doesn't understand proceedings, limited capacity to advocate for self	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
					LA refused)		of aggression	and child	
C005	Children	Resp	Mother	Cost: not eligible for LA	Partial: had LA sol at earlier stage				
C006	Children	App	Father	Cost: exhausted funds	Partial: had sol for divorce		Difficulty controlling emotions	Little idea of how to conduct proceedings, posturing to intimidate M; wary about speaking to M's sol	Unmeritorious application
C012	Children	App	Father	Cost: above LA threshold + Choice: simple case	Wholly			Articulate, confident, capable	Unmeritorious application, serial applicant
C012	Children	Resp	Mother	Difficulties with LA: pending outcome of further application + Choice: prefer to rep self	Partial: had LA sol at earlier stage				
C016	Children	Resp	Mother	Difficulties with LA: pending outcome of further application	Partial: had LA sol at earlier stages and continuing pro bono out of court	Need for DNA test		Reasonably confident, able to express self, but procedurally challenged out of court	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
C017	Children	App	Paternal GM	Cost: not eligible for LA	Wholly	Guardian appointed		Procedurally challenged	
C018	Children	App	Father	Cost: not eligible for LA	Partial: had limited LA at early stages; further LA refused		[Extensive criminal record: violence, disturbances, threats]	No communication between parties; procedurally challenged	Previous no-show
C018	Children	Resp	Mother	Cost: not eligible for LA	Partial: had limited LA at early stages; further LA refused		Victim of violence and abuse; afraid of F	Timid, nervous, limited capacity to advocate for self and child; no communication between parties	Previous no-show
C019	Financial	Resp	Husband	Cost: unable to afford sol	Partial: had sol at earlier stages; withdrew since he didn't provide instructions			Procedurally and legally challenged; refused to speak to W's sol	Not engaging with proceedings; evading service; previous no-shows
C020	Children	App	Father	Cost: over LA threshold	Partial: in/out of court at earlier stages			Articulate, capable	
C021	Children	App	Paternal GM	Difficulties with LA: withdrawn on merits just before hearing	Partial: had LA rep up to this point	Guardian appointed	Very low intellectual ability; illiterate; highly emotional	Inarticulate, unable to put case or understand proceedings	Unmeritorious application

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
C022	Children	App	Father	Cost: above LA threshold	Partial: had initial free consultation with a sol			Procedurally challenged re paperwork	
C023	Financial	Resp	Husband	Choice: distrusts lawyers	Wholly		Imprisoned during proceedings, recently released	Procedurally and legally challenged, though believes self highly capable; no apparent understanding of process	No engagement for considerable period,(though claims never received notices of hearing)
C024	Children	App	Social father	Choice: sol advised he could rep self	Partial: had advice from sol	Question about legal basis for PR application		Legally challenged	
C024	Children	Resp	Mother	Choice: not contesting application	Wholly	Question about legal basis for PR application (not raised)	Mental health issues, now treated; victim of violence and harassment		
C024	Children	Resp	Father	Choice: decided not to participate	Wholly	Question about legal basis for PR application (not raised)			No-show
C025	Children	App	Father	Choice: simple matter	Wholly			Articulate, confident, reasonably capable; poor communication with M	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
C025	Children	Resp	Mother	Cost: above LA threshold	Wholly		Distressed	Articulate, confident, reasonably capable; poor communication with F	
C026	Children	App	Father	Cost: not eligible for LA	Partial: had LA sol at earlier stages, but not extended to final hearing	Local Authority involvement	Learning difficulties; borderline capacity; mental health problems	Needed support worker but not present and court refused to adjourn	
C026	Children	Resp	Mother	Cost: above LA threshold	Wholly	Local Authority involvement	Low literacy		
C027	Financial	Resp	Husband	Cost: can't afford sol in court	Partial: in/out of court	Disputed date of separation: consequences for divorce		Reasonably articulate and capable but legally and procedurally challenged; reluctant to speak to W's sol	
D001	Other (divorce)	Resp	Wife	Says unable to find a solicitor to represent her	Wholly	Wants to contest divorce	Non-English speaker without interpreter	Very limited ability to explain position; attempted litigation by correspondence	
D002	Other (non-mol)	Resp	Male	Refusing to engage in proceedings	Wholly		Alleged mental health problems		Refusing to engage with proceedings

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
D003	Children	App	Father	Difficulties with LA; pending outcome of LA application	Partial: pro bono assistance from sol out of court	Needs sole residence order to get Local Authority housing		Appears competent, organised	
D003	Children	Resp	Mother	DK	Partial: had sol at earlier stage				
D005	Financial	Resp	Wife	Cost: exhausted private funds	Partial: had lawyers in previous proceedings	H's complex finances and application for bankruptcy	Depression, dyslexia	Procedurally and legally challenged; litigation by correspondence; no communication between parties	
D008	Financial	Potential inter-venor	Wife's mother	DK	Partial: receiving assistance from W's lawyers	Intervenor: asserting financial interest in FMH		Somewhat bewildered by proceedings	
D009	Children	Resp	Father	Cost: above LA threshold	Partial: represented in previous proceedings	Police disclosure required; Local Authority involvement	Alleged drug abuse	Procedurally and legally challenged	
D010	Children	App	Father	Choice: prefers to rep self, simple matter	Wholly			Articulate, organised, confident, capable; no direct communication between parties	Serial applicant; previously restrained from making further applications without permission

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
D013	Other (SG)	App	Mother's sister	Cost: not eligible for LA for court	Partial: assistance from sol out of court on Legal Help				
D013	Other (SG)	Resp	Mother	Choice: not necessary	Wholly		Terminal illness		
D013	Other (SG)	Resp	Father 1	Not appearing	Wholly				No-show, but sent letter
D014	Financial	App	Wife	Cost: saving money	Partial: in/out of court		Very nervous, unable to sleep before hearing	Procedurally and legally challenged	
D014	Financial	Resp	Husband	DK	Wholly				No-show, refusing to engage with process
D015	Children	App	Father	Cost: above LA threshold	Partial: instructed barrister for one hearing but unable to afford further		Alleged victim of violence		
D015	Children	Resp	Mother	Cost: above LA threshold	Partial: in and out of representation		Alleged victim of violence		No-show, delaying tactics
D016	Other (SG)	Resp	Father	Cost: not eligible for LA for court	Partial: has sol under Legal Help: advice and assistance	Guardian appointed; Local Authority involvement;	In prison, attendance dependent on agreement of	Very limited ability to prepare; very limited grasp of proceedings or	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
					out of court only	adoption proceedings running in parallel	prison governor	ability to participate effectively	
D017	Children	App	Father	Cost: above LA threshold	Partial: had one free consultation with a sol	Local Authority involvement		Litigation by correspondence; poor communication between parties	
D017	Children	Resp	Mother	Choice: prefer to rep self + Cost: above LA threshold	Partial: had LA sol at earlier stage but now working full-time no longer eligible	Local Authority involvement	Angry and emotional	Litigation by correspondence; poor communication between parties	
D018	Children	App	Father	Cost: exhausted private funds	Partial: had sol at earlier stages	Local Authority involvement		Educated, articulate, quite competent in court, but procedurally challenged	
D019	Children	App	Father	Cost: above LA threshold	Wholly			Little understanding of court process; extensive litigation by correspondence	
D019	Children	Resp	Mother	Cost: above LA threshold	Partial: in and out of representation		Alleged victim of violence, threats, abuse, intimidation	Little understanding of court process; extensive litigation by correspondence	



Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
D020	Children	App	Father	Cost: saving money + reliance on children's lawyer	Partial: represented up to this point	Guardian appointed; s 37 report		Well-educated, articulate	
D020	Children	Resp	Mother	Cost: saving money + reliance on children's lawyer	Partial: represented up to this point	Guardian appointed; s 37 report	Victim of serious violence	Well-educated, reasonably articulate but subdued	
D023	Children	Resp	Mother	DK	Wholly		Alleged victim of violence; very young mother		Not engaging with court proceedings or Cafcass, no-shows at several hearings
D024	Children	Resp	Mother	Cost: saving money	Partial: in/out of court		Alleged victim of extensive and very serious violence and abuse, fearful of F	Well-educated, articulate, but incapacitated by court process, very limited ability to advocate for self or child; refused to speak to F's sol	
D025	Financial	Resp	Husband	Cost: not eligible for LA	Partial: had sol for divorce; Family Help Higher only for financial proceedings	W moving overseas: need to assess cost and suitability of foreign properties, info all in foreign		Very procedurally challenged; limited capacity to advocate for self	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
						language			
D026	Children	Resp	Mother	Cost: above LA threshold	Partial: had LA sol at earlier stage but now working full-time, no longer eligible	History of Local Authority involvement, previous child protection plan	English not first language; very nervous and agitated	Procedurally and legally challenged; doesn't understand what will happen next; no communication between parties	
D027	Financial	App	Wife	Cost: not eligible for LA	Partial: had LA sol at earlier stage but withdrawn on means; some pro bono help too	Intervenor; H avoiding full disclosure		Very procedurally and legally challenged; litigation by correspondence	
D027	Financial	Resp	Husband	DK	Partial: had self-funded sol at earlier stage	Intervenor; avoiding full disclosure			Not complying with directions; delaying and refusing to engage
D028	Children	Resp	Father	Cost: exhausted private funds	Partial: rep for FR and at earlier stages of CA		Alleged victim of violence	Procedurally challenged; litigation by correspondence	
D029	Financial	Intervenor	Husband's sister 1	Cost: exhausted private funds	Partial: in/out of court at earlier stages	3 intervenors; freezing injunctions; applications to set aside transfers; going		Procedurally and legally challenged; extensive litigation by correspondence	

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
						up to HC			
D029	Financial	Intervenor	Husband's sister 2	Cost: exhausted private funds	Partial: in/out of court at earlier stages	3 intervenors; freezing injunctions; applications to set aside transfers; going up to HC		Procedurally and legally challenged; extensive litigation by correspondence	
D029	Financial	Intervenor	Trustee of charity	DK	Wholly	3 intervenors; freezing injunctions; applications to set aside transfers; going up to HC		Procedurally and legally challenged	
D030	Financial	App	Wife	DK	Partial: LA sol in previous proceedings	Alleged non-disclosure by H	Victim of violence	Procedurally and legally challenged	
D031	Financial	App	Wife	Cost: unable to afford	Partial: rep in previous proceedings and various forms legal assistance at earlier stages of these	Intervenor; contested jurisdiction	Victim of violence; fearful of H; emotional; stressed	Very capable in some respects; feels hopeless without lawyer; contemplating giving up	Non-compliance with directions
E002	Children	Resp	Mother	Cost: above LA threshold	Partial: had sol in previous proceedings				

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
E002	Children	Resp	Father	DK	DK				
E003	Children	App	Father	Cost: above LA threshold	Partial: has had some legal advice			Relatively competent and capable, but procedurally challenged	
E003	Children	Resp	Mother	Cost: above LA threshold	Wholly			Relatively competent and capable, but procedurally challenged	
E006	Children	Resp	Father	Difficulties with LA when financial position changed + Choice: prefer to rep self	Partial: had LA sol up to now, but suspended	Local Authority involvement; DNA testing needed but not pursued after loss of LA funding		Procedurally challenged	
E007	Children	Resp	Father	Difficulties with LA: pending outcome of LA application	Had free half-hour legal advice	Local Authority involvement; DNA testing needed	Drug abuse	Procedurally and legally challenged (e.g. doesn't understand need to attend MIAM)	
E008	Financial	Resp	Husband	Cost: unable to pay assessed contribution to LA	Partial: had LA sol at earlier stage, lost due to non-payment of assessed contribution				Previous no-show

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
E009	Children	Resp	Mother	Cost: unable to pay assessed contribution to LA	Wholly			Unwilling participant	
E010	Children	App	Father	DK	Wholly	Previous Local Authority involvement		Educated, articulate; no communication between parties	
E010	Children	Resp	Mother	DK	Wholly	Previous Local Authority involvement	Victim of serious violent incident	Educated, articulate; no communication between parties	
E011	Financial	Resp	Husband	DK	Wholly			Litigation by correspondence	No-shows; refusing to engage in proceedings
E012	Children	App	Father	Choice: not want to pay lawyer + Cost	Partial: in/out of court				
E012	Children	Resp	Mother	Difficulties with LA: pending outcome of LA application	Partial: has consulted sol out of court				
E014	Children	Resp	Father	Unwilling/ unable to organise legal representation	Wholly	Drug testing needed	Significant mental health issues; alleged drug abuse	No capacity to represent self	Very loud, aggressive, difficult, volatile; requires active management

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
E015	Financial	Resp	Husband	Cost: couldn't afford + Choice: didn't think necessary	Wholly				
E016	Financial	App	Wife	Cost: not eligible for LA	Partial: paid for sol at earlier stage but couldn't continue	H's offshore income; need for emergency freezing injunction	Significant mobility disability; severely impoverished; gets ill with stress of proceedings, sleepless, panic attacks	Very procedurally and legally challenged, not able to advocate effectively for self	
E018	Children	App	Father	Cost: not eligible for LA	Wholly	DNA test needed		Procedurally challenged	No-show
E018	Children	Resp	Mother	Cost: above LA threshold	Wholly	DNA test needed	Intimidated by F	Procedurally challenged; unable to advocate for self or child; unable to bring FR proceedings	
E019	Children	App	Father	DK	Partial: had sol in previous proceedings				Unmeritorious application
E019	Children	Resp	Mother	DK	Partial: had sol in previous proceedings		Very nervous, anxious; victim of harassment and stalking		

Case	Matter	Role	Status	Reason LIP	Legal help	Complexity	Vulnerability	Capacity	Problems for court
E020	Children	Resp	Mother	Cost: above LA threshold	Partial: had sol at earlier stages	Guardian appointed	Terrified of F	Low education; unable to present own case	
E022	Children	Resp	Father	DK	DK				No-show
E023	Other (non-mol, occup order)	Resp	Father	Difficulties with LA: LSC requires further information	Wholly: tried to get legal advice but needed written proof of elig for LA			Able to articulate and achieve what he wanted	
E024	Other (divorce)	Resp	Husband	DK	Wholly	W's application to rescind the DA due to technical error		Legally and procedurally challenged	Previous no-show
E025	Financial	Resp	Husband	DK	Partial: instructed sol initially, but then LIP			Fluent, articulate, over-confident, unable to identify or focus on relevant issues; litigation by correspondence	
E028	Children	Resp	Mother	DK	Wholly				No-show
E029	Children	App	Father	Cost: above LA threshold	Wholly				
E029	Children	Resp	Mother	Cost: above LA threshold	Wholly				
E030	Children	Resp	Mother	Difficulties with LA: LSC requires	Had initial legal advice, but		Drug addiction; alleged victim	Very limited capacity to	

<b>Case</b>	<b>Matter</b>	<b>Role</b>	<b>Status</b>	<b>Reason LIP</b>	<b>Legal help</b>	<b>Complexity</b>	<b>Vulnerability</b>	<b>Capacity</b>	<b>Problems for court</b>
				further information	unable to negotiate complexities of proving income for LA		of violence	advocate for self	



**Table B.2 Characteristics of represented parties (listed by individual litigant)**

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
A001	Financial	App	Wife	Self (prev Legal Help)	Intervenors; overseas property			No evidence of eligibility
A001	Financial	Resp	Husband	Self	Intervenors; overseas property			n/a
A002	Children	App	Father	Self		Drug abuse		n/a
A002	Children	Resp	Mother	LA		Victim of violence (F convicted for assault on her)		Likely still eligible. Assessed as unsuitable for mediation by mediator and Cafcass
A003	Children	App	Father	LA	DNA testing needed			Not eligible
A004	Children	App	Mother	LA	Local Authority involvement	Victim of violence (F convicted for breach of NMO); afraid of F; alleged chaotic lifestyle and mental health issues		Likely still eligible
A005	Financial	App	Wife	LA (prev LIP)	Application for MPS; need for actuarial report re H's pension		W filed application as LIP but failed to file evidence on time, unable to articulate what she wanted; court unable to reach decision, compelled to adjourn; W	Not eligible

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
							then obtained repr	
A005	Financial	Resp	Husband	Self	Application for MPS; need for actuarial report re H's pension			n/a
A006	Children	App	Father	Self	Local Authority and police involvement; FFH re allegations of child sexual abuse; Guardian appointed			n/a
A007	Children	App	Father	Self	Local Authority involvement			n/a
A011	Children	Resp	Mother	Self		Victim of violence and threats; history of depression		n/a
A013	Children	App	Father	LA		Epilepsy		Not eligible
A015	Financial	App	Wife	DK				No evidence of eligibility
A016	Financial	Resp	Wife	LA		Victim of violence (applied for NMO but H gave undertaking)		Would depend on date of undertaking
A017	Children	App	Father	DK			Aggressive at court	No evidence of eligibility
A018	Children	App	Father	LA		Drug and alcohol abuse		Not eligible
A019	Children	App	Father	DK				Not eligible

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
A021	Children	App	Wife	DK				No evidence of eligibility
A022	Children	App	Father	LA				Not eligible
A023	Children	App	Wife	LA	Third party seeking charging order over H's share of FMH	Victim of serious violence, abuse, control, stalking (police, MARAC, Women's Aid involvement, ex parte NMO granted); very frightened of H; treated for depression		Likely still eligible
A024	Financial	App	Wife	LA	Transfer of Housing Assoc Tenancy: court order required; pension splitting			No evidence of eligibility
A025	Financial	App	Wife	LA	Pension splitting, need to instruct actuary	Alleged victim of violence; stressed by proceedings and having to deal with H		No evidence of eligibility
A026	Children	App	Father	LA		Alleged alcohol abuse  [Extensive criminal record for personal violence offences]	Serial applicant; refusal to comply with alcohol testing	Not eligible.  Cafcass says not suitable for mediation.
A028	Children	App	Mother	LA		Victim of violence (has NMO, F convicted of one breach and further prosecutions for		Likely still eligible

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
						breaches pending)		
A029	Financial	App	Wife	LA	Non-disclosure by H, non-compliance with previous orders	Non-English speaking; victim of violence (app for NMO, H made undertaking); has severely disabled child		Likely still eligible on DV grounds, but would also have to pass new means test
A030	Children	App	Mother	Self		Victim of violence; F convicted for assault on her		n/a
B001	Children	Resp	Mother	DK				No evidence of eligibility
B002	Children	App	Father	LA	Drug testing needed	Alleged drug abuse		Not eligible
B002	Children	Resp	Mother	LA				No evidence of eligibility
B003	Children	App	Father	LA	Local Authority involvement; child placed in LA foster care	Alleged alcohol abuse		Not eligible
B004	Children	App	Father	LA	Guardian appointed			Not eligible
B004	Children	Resp	Mother	LA	Guardian appointed			No evidence of eligibility
B011	Children	App	Father	LA		Non-English speaking	Unmeritorious application	Not eligible; assessed unsuitable for mediation

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
B012	Children	App	Father	LA		Non-English speaking		Not eligible
B012	Children	Resp	Mother	DK		Alleged victim of verbal abuse		No evidence of eligibility
B013	Children	App	Father	LA	Local Authority involvement	Alleged drug and alcohol abuse  [Has criminal record for assaults on women and rape of a minor]		Not eligible
B013	Children	Resp	Mother	LA	Local Authority involvement	Victim of violence (Local Authority reports of domestic abuse)		Would depend on date of latest LA assessment
B014	Children	App	Father	LA		Non-English speaking		Not eligible
B014	Children	Resp	Mother	DK				No evidence of eligibility
B015	Children	App	Father	LA	Local Authority involvement; police disclosure	Victim of violence (has NMO against M)		Likely still eligible
B015	Children	Resp	Mother	LA	Local Authority involvement; police disclosure	Alleged mental health problems		Not eligible
B023	Children	App	Father	LA		Application refers to need for interpreter but none present at observed hearing		Not eligible

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
B023	Children	Resp	Mother	LA		Alleged victim of violence		No evidence of eligibility; agreed not to have FFH
B031	Children	App	Father	LA	Drug testing needed	Alcohol and cannabis use; serious mental illness		Not eligible
B031	Children	Resp	Mother	LA		Alleged victim of emotional abuse		No evidence of eligibility
B034	Children	App	Father	Self				n/a
B051	Children	Resp	Mother	DK – self?	Police disclosure	Victim of emotional abuse and harassment (has RO vs F, breached)		n/a
B053	Financial	App	Civil partner	DK – self?				n/a
B053	Financial	Resp	Civil partner	DK – self?				n/a
B054	Children	App	Mother	LA	Guardian appointed	Alleged victim of emotional, psychological and verbal abuse		No evidence of eligibility
B055	Financial	App	Wife	LA	Effect of maintenance on W's benefits; charge on FMH by local authority; value of H's pension			No evidence of eligibility; H rejected mediation

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
B055	Financial	Resp	Husband	Self	Effect of maintenance on W's benefits; charge on FMH by local authority; value of H's pension			n/a
B058	Children	App	Mother	LA		Alleged drug abuse; victim of physical and emotional abuse (has RO vs F after assault on her)		Likely still eligible
B060	Financial	App	Wife	Self	Alleges undisclosed overseas assets; large, complicated business loan; need for expert valuation of business; Intervenor	Alleged victim of violence; spent time in refuge; safety concerns at court		n/a
B060	Financial	Intervenor	Son	Self	Large, complicated business loan; need for expert valuation of business; Intervenor			n/a
B062	Financial	App	Wife	Self		Alleged victim of physical and verbal abuse		n/a
C003	Children	App	Father	LA		Alleged drug addiction [extensive criminal history]	Volatile, disruptive, repeatedly shouting at and insulting M, unrestrained by sol	Not eligible
C004	Children	App	Father	LA				Not eligible

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
C004	Children	Resp	Mother	LA				Not eligible
C005	Children	App	Father	Self				n/a
C006	Children	Resp	Mother	Self		Victim of stalking and harassment		
C007	Children	App	Father	LA				Not eligible
C007	Children	Resp	Mother	LA		Alleged victim of violence; alleged mental health problems		No evidence of eligibility
C008	Children	App	Mother	DK	Local Authority involvement	DK		No evidence of eligibility
C008	Children	Resp	Father	DK	Local Authority involvement	DK		No evidence of eligibility
C009	Financial	App	Wife	Self				n/a
C009	Financial	Resp	Husband	Self				n/a
C010	Children	App	Mother	DK				No evidence of eligibility
C010	Children	Resp	Father	LA				Not eligible
C011	Children	App	Father	DK				Not eligible
C011	Children	Resp	Mother	LA		Alleged alcohol abuse		No evidence of eligibility; refused mediation



Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
C013	Children	App	Father	DK	Previous Local Authority involvement; need for drug testing	Drug abuse [extensive criminal history: drugs and violence]		Not eligible; Cafcass says conciliation inappropriate
C013	Children	Resp	Mother	DK	Previous Local Authority involvement	Victim of serious violence		Unclear; Cafcass says conciliation inappropriate; will not attend mediation
C014	Children	App	Father	LA		[Extensive criminal history]		Not eligible
C014	Children	Resp	Mother	DK		Victim of violence		No evidence of eligibility
C015	Children	App	Father	LA		Alleged alcohol abuse		Not eligible
C015	Children	Resp	Mother	LA		Alleged victim of emotional abuse		Not eligible
C016	Children	App	Father	LA	Need for DNA test			Not eligible
C017	Children	Resp	Father	DK	Guardian appointed			DK
C017	Children	Resp	Mother	DK	Guardian appointed			DK
C019	Financial	App	Wife	DK				No evidence of eligibility
C020	Children	Resp	Mother	LA		Limited English; victim of serious violence and threats to kill from F and his family (they convicted		Likely still eligible

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
						of assaults on her)		
C021	Children	Resp	Mother	LA	Guardian appointed	Victim of very serious violence from subsequent partner, needs to maintain secrecy of address		Not eligible on facts (severe violence against her was not by applicant)
C022	Children	Resp	Mother	LA				No evidence of eligibility
C023	Financial	App	Wife	DK				No evidence of eligibility
C027	Financial	App	Wife	LA				No evidence of eligibility; rejected mediation
D001	Other (divorce)	App	Husband	DK				Not eligible
D002	Other (non-mol)	App	Female	Self		Victim of serious physical violence		n/a
D004	Financial	App	Wife	LA	H's overseas earnings and pension	Much younger and much lower earning capacity than H		No evidence of eligibility
D004	Financial	Resp	Husband	Self	H's overseas earnings and pension			n/a
D005	Financial	App	Husband	Self (prev LIP)	H's complex finances and application for	Claims to be bankrupt	Litigation by correspondence when LIP; serial applicant	n/a

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
					bankruptcy			
D006	Children	App	Father	LA	Local Authority involvement; possible need for FFH	Non-English speaking		Not eligible
D006	Children	Resp	Mother	LA	Local Authority involvement (children been subject to CPP); possible need for FFH	Non-English speaking; 2 children with serious disabilities; victim of violence (NMO and F convicted of assault)		Likely still eligible
D007	Children	App	Father	Self				n/a
D007	Children	Resp	Mother	Self				n/a
D008	Financial	App	Wife	Self	Potential intervenor			n/a
D008	Financial	Resp	Husband	Self	Potential intervenor			n/a
D009	Financial	App	Mother	Self (family)	Police disclosure required; Local Authority involvement	Victim of violence; alleged drug abuse		n/a
D010	Children	Resp	Mother	Self		Alleged victim of controlling behaviour		n/a
D011	Children	App	Father	Self				n/a
D011	Children	Resp	Mother	Self				n/a
D012	Children	App	Mother	LA	Local Authority involvement	Alleged victim of violence over long period and ongoing threats		No evidence of eligibility; refused mediation

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
D012	Children	Resp	Father	LA	Local Authority involvement	[Criminal history: drugs]		Not eligible
D016	Other (SG)	App	Mother's sister	LA	Guardian appointed; Local Authority involvement; adoption proceedings running in parallel			Not eligible
D016	Other (SG)	Resp	Mother	LA	Guardian appointed; Local Authority involvement; adoption proceedings running in parallel	Unable to care adequately for children: oldest child living with sister; two younger children in foster care and subject to adoption proceedings		Would be eligible for public law proceedings
D018	Children	Resp	Mother	Self	Local Authority involvement			n/a
D021	Children	App	Mother	LA	Local Authority involvement; s 37 report; drug testing ordered	Been in prison; victim of violence, alleged abuse and control; alleged drug and alcohol abuse		No evidence of eligibility
D021	Children	Resp	Father	LA (initially LIP)	Local Authority involvement; s 37 report; drug testing ordered	Alleged drug abuse; limited English		Not eligible
D022	Children	App	Father	DK	FFH		No-show on second day	Not eligible
D022	Children	Resp	Mother	DK	FFH	Alleged victims of violence and threats		DK

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
D023	Children	App	Father	LA				Not eligible
D024	Children	App	Father	Self		Alleged untreated mental illness, alcoholic		Not eligible
D025	Financial	App	Wife	Sears Tooth	W moving to live overseas: need to consider cost and suitability of foreign properties			n/a
D026	Children	App	Father	Self	History of Local Authority involvement, previous child protection plan	English not first language	History of serial applications	n/a
D027	Financial	Inter-venor	Husband's creditor	Self				n/a
D028	Children	App	Mother	DK		Alleged victim of serious violence; alleged alcohol abuse, emotional instability		No evidence of eligibility
D029	Financial	App	Wife	LA	3 intervenors; freezing injunctions; applications to set aside transfers; going up to HC; collateral litigation			No evidence of eligibilty
D029	Financial	Resp	Husband	LA (prev self and	3 intervenors; freezing injunctions; applications to set		Litigation by correspondence when LIP	No evidence of eligibility

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
				LIP)	aside transfers; going up to HC; collateral litigation			
D030	Financial	Resp	Husband	Self				n/a
D031	Financial	Resp	Husband	Self	Intervenor; jurisdictional contest			n/a
D031	Financial	Intervenor	Husband's father	Self	Intervenor; jurisdictional contest			n/a
E001	Children	App	Father	LA	Need for FFH; Local Authority involvement	Young father; alleged drug abuse; mental health issues		Not eligible
E001	Children	Resp	Mother	LA	Need for FFH; Local Authority involvement	Victim of violence, harassment (RO in force, breached); young mother; alleged drug abuse		Likely still eligible
E002	Children	App	Paternal GM	LA			Unmeritorious application	Not eligible
E004	Children	App	Father	LA		[Numerous convictions for violence and harassment]		Not eligible
E004	Children	Resp	Mother	DK		Learning difficulties; victim of serious violence and threats; alleged drug abuse		Unclear

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
E005	Children	App	Mother	LA		Alleged victim of violence		No evidence of eligibility
E005	Children	Resp	Father	DK				No evidence of eligibility
E006	Children	App	Mother	LA	Local Authority involvement	Victim of violence (F cautioned for assault on her Sept 2011)		Eligible only up to Sept 2013
E007	Children	App	Paternal GM	Self	Local Authority involvement			n/a
E007	Children	Resp	Mother	LA	Local Authority involvement; DNA testing needed	Mental health issues		No evidence of eligibility
E008	Financial	App	Wife	LA		Alleged victim of violence		No evidence of eligibility; assessed unsuitable for mediation
E009	Children	App	Father	LA	Drug testing needed	[Long criminal record]		Not eligible
E011	Financial	App	Wife	LA	H's non-disclosure and otherwise non-engagement	Hearing impaired; English second language; alleged long-term victim of violence		No evidence of eligibility
E013	Children	App	Mother	LA	Police disclosure needed; previous Local Authority involvement	Alleged victim of violence; history of alcohol, drugs		No evidence of eligibility

Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
E013	Children	Resp	Father	LA	Drug testing and police disclosure needed; previous Local Authority involvement	Alleged drug abuse  [extensive criminal record]		Not eligible
E014	Children	App	Mother	LA	Drug testing needed	Alleged drug abuse; alleged victim of physical, emotional, sexual abuse		No evidence of eligibility
E015	Financial	App	Wife	Self (paid by H)				n/a
E016	Financial	Resp	Husband	Self	Offshore income		Unmeritorious application?	n/a
E017	Financial	App	Wife	LA				No evidence of eligibility
E017	Financial	Resp	Husband	LA				No evidence of eligibility
E020	Children	App	Father	LA	Guardian appointed	Mental health problems	No-show, no contact with sol, no instructions	Not eligible
E021	Financial	App	Husband	Self				n/a
E021	Financial	Resp	Wife	Self				n/a
E022	Children	App	Mother	LA				No evidence of eligibility
E023	Other (FLA)	App	Mother	LA		Victim of violence (NMO and occupation order granted)		Still eligible for FLA proceedings and likely still eligible



Case ID	Matter	Role	Status	Funding of rep	Complexity	Vulnerability	Problems for court	Continuing LA eligibility
								for CA proceedings
E024	Other (divorce)	App	Wife	Self	Application to rescind the DA due to technical error			n/a
E025	Financial	App	Wife	Self		Alleged victim of violence		n/a
E026	Children	App	Mother	LA		Young mother; victim of violence (police involvement but NFA)		No evidence of eligibility
E026	Children	Resp	Father	LA		Alleged alcohol abuse		Not eligible
E027	Financial	App	Wife	Self				n/a
E027	Financial	Resp	Husband	Self				n/a
E028	Children	App	Father	LA				Not eligible; M rejected mediation
E030	Children	App	Father	Self				n/a
E031	Children	App	Father	LA		Deaf, needs signer		Not eligible; assessed unsuitable for mediation
E031	Children	Resp	Mother	Pro bono		Deaf, needs signer		Not eligible; assessed unsuitable for mediation

## Appendix C

### Data from the financial settlements project

#### C.1 Introduction

The data reported in this appendix come from a study of financial settlements on divorce funded by the Nuffield Foundation.<sup>127</sup> They were collected from 399 court files,<sup>128</sup> from four courts in different regions, in which final orders in the financial case were made in two periods between 2010-2012.<sup>129</sup> While the observation study dealt with live cases and focused on court hearings, the financial settlements project dealt with closed cases and is thus able to provide an overview of each case in its entirety, including matters dealt with almost entirely on paper by judicial box work, rather than through hearings. These data therefore give insight into the prevalence of (i) litigants in person in financial cases in the strict sense of parties who represent themselves at court hearings, and (ii) parties navigating paper-based areas of family justice (divorce and financial consent orders) with and without evident lawyer support. The overwhelming majority of divorces and a substantial majority of financial cases proceed entirely on paper.<sup>130</sup> These cases therefore comprise a significant proportion of the overall workload of the family justice system and so represent the experience of a large majority of family court customers in divorce/financial cases.

#### C.2 Involvement of solicitors in divorce cases

The data reported here is on the involvement of solicitors for petitioners and respondents in divorce cases at the point of petition/acknowledgement of service. A party may be technically represented (despite the improbability of any hearings in a divorce case), merely advised/assisted or acting without any apparent lawyer support (where no solicitor involvement is evident from any of the paperwork). In many cases in this study, it was clear which category applied, but in others while a solicitor was evidently involved for one or other party at the relevant stage, it was not clear in what capacity. It is important to bear in mind that these data come from cases in which the divorce involved a financial order: around only

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<sup>127</sup> Hitchings, Miles and Woodward (2013).

<sup>128</sup> See Section C.4 below for a full description of the methodology, which essentially involved collecting cases on a census basis, rather than sampling for particular types of case.

<sup>129</sup> Some cases commenced after the introduction of the new Family Procedure Rules and all concluded before the implementation of the LASPO Act 2012.

<sup>130</sup> In 2010, for example, 72.7% of all ancillary relief disposals made in the county courts were uncontested from the outset: table 2.6, *Family matters*, Judicial and Court Statistics 2010: <https://www.gov.uk/government/publications/judicial-and-court-statistics-annual-2010>. Hearings in relation to divorce applications (usually concerning costs or respondents' applications for decree absolute) were only noted in a handful of cases.

38% of all divorces fall into that category,<sup>131</sup> so the findings cannot be assumed to be typical of all divorces.<sup>132</sup>

Table C.1 reports the representation profile of divorce cases, combining all cases of known solicitor involvement (whether represented, advice/assistance only or unclear) into one category. This includes some parties who acquired lawyer support only after one or more unsuccessful attempts to complete the paperwork alone. Where there was no evidence of a lawyer on the court file at the petition/acknowledgement stage,<sup>133</sup> the case was treated as one of no lawyer involvement – but the researchers cannot exclude the possibility that some of these parties had received advice at some stage, and the team were aware that some certainly acquired a solicitor later in the lifetime of the divorce proceedings (perhaps in anticipation of or prompted by the financial application).

**Table C.1: Representation profile of divorce cases at petition/acknowledgement of service**

<b>Representation</b>	<b>Number</b>	<b>Percentage</b>
Both parties with lawyer involvement	248	62%
Only one party with lawyer involvement	130	33%
Neither party with lawyer involvement	21	5%
<b>Total</b>	<b>399</b>	<b>100%</b>

It was more common for a respondent (35%) than a petitioner (8%) to be acting without any support from a lawyer. Similar percentages of wife and husband respondents acted alone (36 wives, 35% of 102 wife respondents; 105 husbands, 35% of 297 husband respondents), but a higher proportion of husband than wife petitioners acted alone (12%, 12 out of 102 husband petitioners, as compared with 6%, 19 out of 297 wife petitioners).

<sup>131</sup> This proportion can be roughly calculated (bearing in mind that some divorces will occur in a different year from the accompanying financial order) from a comparison of published HMCTS data for the number of complete financial orders in a year as compared with the number of divorces granted in a year – the 38% figure reflects 2011 figures: see MOJ (2013), tables 2.8 and 2.9.

<sup>132</sup> Indeed, note by contrast Moorhead and Sefton’s finding of a far higher proportion of petitioners acting in person in their sample of cases from 2000 onwards: (2005: 26), table 4.

<sup>133</sup> Parties have been classified as having no lawyer involvement at this stage where it was clear from the file that any lawyer arrived on the scene at a later stage; but one spouse was classified as having lawyer involvement where there was a notice of acting for that spouse 10 days after the acknowledgement of service (completed in person) had been signed. Where the respondent apparently failed to participate at all were classified as cases of no lawyer involvement.

### C.3 Involvement of solicitors in financial order cases

In analysing the data from the financial order stage of the court files, cases where the initial court application was for a consent order and those where the application was initially contested were treated separately.

#### Consent applications

The vast majority of pure consent order cases – those in which the initial application to court in the financial case was for a consent order – proceeded entirely on paper. The dataset contained 260 such cases (c. 65% of the total). A party may have a lawyer from whom he or she was receiving substantial support (including correspondence with the court in response to queries) which may be regarded as functionally equivalent to representation for these out of court cases, even though that lawyer was not technically acting for him or her. Only where an approval hearing was required before the judge was prepared to make the financial order did representation in court in pure consent order cases become important. Otherwise, the advising/assisting lawyer's involvement might have been functionally equivalent in those cases to representation.

As in table C.1 above, having “lawyer involvement” referred to all cases where solicitor support for a spouse at or around the consent order application stage was apparent. This category covered widely varying levels of involvement – e.g. in some instances, only limited (including free) advice and/or drafting assistance was supplied; in others, the solicitor was fully involved until after the consent order had been drafted; it was not possible on the basis of the data collected from court files to distinguish clearly between different levels of lawyer support. Where a party completed all the paperwork him- or herself, no solicitor details were evident, and no positive indication of advice relating to the consent order application having been received was identified, that party was treated as acting without lawyer involvement.<sup>134</sup> Cases are also defined as “without lawyer involvement” where spouses were apparently alone in preparing and making the application, although legal advice or assistance was provided at an earlier or later stage (see below).

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<sup>134</sup> The researchers treated as having had lawyer support one case party who signed in person but had solicitors who sent in the paperwork, writing to the court to say that they had advised against the proposed order.

**Table C.2: Representation profile of consent order application cases**

<b>Representation</b>	<b>Number</b>	<b>Percentage</b>
Both parties with lawyer involvement	163	64%
Only one party with lawyer involvement	83	33%
Neither party with lawyer involvement	8	3%
<b>Total</b>	<b>254<sup>135</sup></b>	<b>100%</b>

Of the 83 cases where only one party had a lawyer, in around 71% the party with the lawyer was the wife and in 29% the husband.

The analysis then examined whether the 107 parties (36 wives, 71 husbands) who had no evident lawyer support for the consent order application had nevertheless received any advice at some stage:

- In 73 cases, the position was essentially unclear. Whilst there was reason to speculate that 17 of these spouses might have had some advice about the money issues (e.g. having had a lawyer at the divorce stage), for most of these spouses, no positive evidence of any advice having been received was found but, as with the divorces cases, cannot exclude the possibility that some advice might have been obtained at some point.
- 9 parties were clearly advised at some stage, in some cases rather earlier when concluding a separation deed, in others having sought advice when the judge queried the proposed order.<sup>136</sup>
- 25 parties (5 wives, 20 husbands) made an express declaration that they had received no independent advice on the consent order application, although it seemed conceivable (even probable) in some of these cases that advice on the money issues (albeit not specifically on the proposed order) had been received at some point.

Though one or both parties being in person was commonly cited as a or the reason for requiring an approval hearing in pure consent order cases, such hearings were not invariably required. The researchers noted 19 approval hearings, 13 of which were required because a party was identified by the court as acting in person, and 21 parties (11 wives and 10 husbands) were identified as appearing in person at such hearings (5 hearings involving both

<sup>135</sup> In 6 cases (7 spouses) the position was unclear; these cases have been excluded from this analysis.

<sup>136</sup> In the ninth case, the spouse negotiated in person with the other side’s lawyer, who then appeared to assist both spouses in putting the paperwork before the court.

spouses), of whom 8 had had lawyer support for the consent application but, either because of limits of their public funding (non-certificated work only) or as privately paying clients, appeared in person at the hearing.

### Contested applications

Of the 139 cases which started as a contested application, 23 cases (17%) settled before the first directions appointment ('FDA', a purely procedural, case management hearing) and a consent order application was sent in, so representation in court was not required.<sup>137</sup> In these cases, the prompt of the contested application had perhaps helped to encourage settlement before the parties embarked on the standard pathway of financial order hearings.<sup>138</sup> Lawyer involvement was prevalent amongst these cases which settled pre-FDA. Of the 45 parties for whom there was data,<sup>139</sup> all bar two clearly had a lawyer or some other advisor<sup>140</sup> involved in their case.

The remaining 116 contested applications did embark on the standard hearings pathway and over 80% of them settled.<sup>141</sup> Table C.3 shows the representation status of those contested applications in the same terms as used in the observation study in the main part of this report. For the purposes of classifying the case as "fully represented", "semi-represented" (one party represented throughout, the other not), and "non-represented" (neither party represented throughout), individual parties have been characterised as 'represented' if they appeared to have been represented throughout the case (save for the very early and very late stages of the case)<sup>142</sup> and 'unrepresented' if they acted in person at any point during the case.<sup>143</sup>

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<sup>137</sup> Only in a handful of these cases can it be said confidently from the data collected that one or both spouses would have been represented had the matter proceeded to FDA stage and beyond; for most cases, the nature of the known solicitor's involvement is unclear. Included in the 'before FDA' group was one case commenced with a Form D11 application (for an agreement to be converted into a consent order) that settled before its listed hearing.

<sup>138</sup> In 2 of these cases, there had been hearings on applications for maintenance pending suit at which one party appeared in person.

<sup>139</sup> One spouse's lawyer involvement status was unclear.

<sup>140</sup> In 2 cases, the husband appears to have received advice (and, in one of those cases, assistance) from an organisation other than a solicitor.

<sup>141</sup> Adjudicated orders were clearly made in 19 cases following a final hearing (in one case this has been inferred this from the data collected). There are two other cases which went to a final hearing but in relation to which it is unclear from the data collected whether the final order was made by consent; for full detail on the classification of these and some other individual cases, see Hitchings, Miles and Woodward (2013), 63, n 133.

<sup>142</sup> E.g. issuing proceedings apparently without a lawyer, but solicitor then very quickly comes on board; case settled and consent order application fully prepared, but party attends routine approval hearing alone.

<sup>143</sup> Parties are treated as "unrepresented" where they appeared in person at a hearing, and in cases of non-participation and non-attendance (including where a lawyer was present in the party's absence but expressly not on the record as acting for the party in question). In six cases where there is missing data for part of the attendance record at key hearings (First Directions Appointment, Financial Dispute Resolution hearing, Final Hearing), the team have sought to infer each party's overall representation profile based on the data available;

**Table C.3: Representation profile of contested applications that went to FDA or beyond**

<b>Representation</b>	<b>Number</b>	<b>Percentage</b>
Fully represented	75	65%
Semi-represented	33	28%
Non-represented	8	7%
<b>Total</b>	<b>116</b>	<b>100%</b>

In the 33 cases in which only one party was represented throughout, 11 of those acting in person at any point were wives and 22 husbands; and in the cases for which there was information,<sup>144</sup> 8 of those acting in person were applicants and 23 respondents.

Data from the financial settlements study support the main study’s finding that being a litigant in person was not a homogenous experience. Amongst the 49 parties who acted in person at any point, 20 were in person throughout (8 wives and 12 husbands); 24 were partially represented (10 wives and 14 husbands); and 5 parties either did not participate at all or very nearly so.

There was evidence that 32 of the 49 parties acting in person at any point received some legal advice. Included in that count are parties who were represented at some stage: where the party was represented before acting in person, that earlier advice may have helped them when later acting in person, but where representation arrived later or intermittently, it was not known whether the party had access to advice throughout their time acting in person.

Twenty appeared in person at all hearings<sup>145</sup> while 22 appeared in person at some hearings. As in the main study, the latter group experienced different trajectories of partial representation, some starting out alone but acquiring representation later, others starting with representation but latterly acting in person, and others moving in and out of representation more than once. Five parties failed to attend (in one case, after having acted in person at some early hearings). And in two cases, the party was represented at all hearings but acted in person in between.

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this is chiefly relevant to decisions to classify some parties as being represented throughout. Data regarding attendance and representation at extra directions hearings was not always clear.

<sup>144</sup> In one case, the application was contested, but there was no data on the applicant’s identity. Two further cases involved cross-applications.

<sup>145</sup> For which there was have data: see n 130 above.

Amongst cases that went to the FDA or beyond, fully represented cases in the survey were more likely to settle (93%, 69 out of 74) than those involving one party in person at any point (72%, 23 out of 32) or those where both parties had at some stage been in person (38%, 3 out of 8).<sup>146</sup> Table C.4 reports when the 92 cases which settled before the Final Hearing did so.<sup>147</sup> Excluded from the table are the 3 cases that settled at the final hearing; those had a mixed profile,<sup>148</sup> although none – probably for good reason – appeared to have had a financial dispute resolution appointment ('FDR').<sup>149</sup> Since there were only a small number of non-represented cases, semi- and non-represented cases have been combined for the purposes of statistical comparison with fully represented cases. Two broad categories were used to identify stage of settlement: pre-FDR (i.e. before the hearing at which a judge may be expected to give an indication of how the case should settle, designed to encourage the parties to reach agreement) and at FDR<sup>150</sup> or before a final hearing (i.e. usually<sup>151</sup> following the input of an FDR). As Table C.4 records, cases in the survey involving one or both parties acting in person at any stage were more likely to settle at a later stage of proceedings (at or after the FDR) than cases where both parties were represented throughout, which were more likely to settle before the FDR.<sup>152</sup> These data suggest that there is an association between legal representation and settlement, and stage of settlement, in the cases in the court file survey. However, it cannot be determined from the data whether lawyer involvement (or not) was causally related to settlement being achieved, or to its being achieved earlier; it may be that the types of parties or cases involving LIPs were systematically different in some (possibly unobserved) way from those in which parties were represented throughout.

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<sup>146</sup> A Chi square test suggests that this finding is significant: Chi sq =20.913.357, df=2, p=<0.001, but this is noted with some caution given the various limitations of the dataset addressed in the technical discussion below. It is important also to bear in mind that the coding of a case as involving a LIP or LIPs does include cases where there was some lawyer input (at some hearings and/or out of court), so there may be under-estimating of the difference between fully represented cases and what might be called "pure" LIP cases, where one or both parties are entirely unrepresented or even unsupported throughout. Note that this analysis excludes the two cases which went to a final hearing but in relation to which it is unclear from the data collected whether the final order was made by consent; in both cases, both parties were represented and present at the final hearing, but overall one was fully represented and one was semi-represented.

<sup>147</sup> The stage at which settlement was reached was generally clear from information on file, but in a few cases the team had to exercise judgement in deciding how to code.

<sup>148</sup> One was fully represented; in the other two, neither party was represented throughout: in one case, there appeared to be no legal representation for either party at any stage, whilst in the other, one party had acquired legal representation by the time of the Final Hearing.

<sup>149</sup> Exclude here also were the two cases mentioned above which had a final hearing but in relation to which it is unclear whether the final order was made by consent.

<sup>150</sup> Included here are four cases in which the FDA was used as an FDR.

<sup>151</sup> Though not always: include here are three cases in which no FDR was due to take place – or had apparently been abandoned – because it was not expected to be productive, and a fourth in which it is unclear whether the FDR occurred.

<sup>152</sup> Again, a Chi square test (with Continuity Correction) suggests significance: Chi square with Continuity Correction = 7.876, df = 1, p= 0.005. Using Fisher's Exact Test (given low expected cell counts) also gives a significant result: p= 0.002. But the express the same caution as at n 133 above regarding the robustness of this finding given the limitations of the dataset discussed below.



**Table C.4: Stage at which case settled by representation profile**

Representation	When did case settle		Total
	At FDA/before FDR	At FDR/before FH	
Fully represented	29 (43%)	39 (59%)	68 (100%)
One/both parties in person at some stage	2 (8%)	22 (92%)	24 (100%)
<b>Total</b>	<b>31</b>	<b>61</b>	<b>92</b>

## C.4 Technical discussion of the case file study data

### The dataset and method by which cases were selected

The court file study component of the financial settlements project aimed essentially to provide data about cases involving financial orders on divorce in this jurisdiction, following a request for research in this area in Norgrove’s Family Justice Review. That Review identified a research gap for this topic generally and more specifically relating to the stage at which consent is reached in cases that settle.<sup>153</sup> The project was designed to collect largely descriptive data.

The cases for the financial settlements data were drawn from four courts of varying sizes and socio-economic contexts located in four different regions of England. The researchers aimed to collect data from 100 files from each court (in two sets of 50 for two time periods) in which a financial order had been made disposing of an application for financial relief following divorce under the Matrimonial Causes Act 1973 (giving a total of 400 – achieved number 399).<sup>154</sup> HMCTS provided two lists of cases for each court in which the financial order was recorded as having been made before a given date on FamilyMan. The first date preceded the introduction of the new Family Procedure Rules 2010; the second followed the introduction of those new Rules, but preceded implementation of LASPO 2012 legal aid reforms. The researchers aimed to draw 50 files going backwards from each of these two dates in each court.<sup>155</sup> The researchers did not target or over-sample for specific types of case, simply taking files as they came from the list (on a census basis) in order to gain a

<sup>153</sup> Norgrove (2011), Annex E.

<sup>154</sup> One file was only identified as ineligible after the data collection had concluded.

<sup>155</sup> In reaching the target of 50 orders per tranche for each court, the cases that were included naturally depended on the order in which cases happened to be entered on the FamilyMan list by court staff (it is not known what protocols, if any, court staff worked to in entering cases on the database, or whether they simply went through the pile of files as they came into the office). Where there were several cases on the same day, some pure consent orders, others following a contested application, it may be a matter of chance which were listed first and so picked up to count towards our 50 cases; the researchers may also have inadvertently skipped a case towards the end of two lists, taking the next file instead.

snapshot of the financial order “business” of each court in each time period.<sup>156</sup> The researchers excluded a number of cases on the list provided by HMCTS from the data collection for the reasons recorded in the table below.<sup>157</sup> Where a file was excluded (or simply missing), the researchers moved on to the next file on the list until the target number had been achieved. The resulting limitations in the coverage of the dataset, discussed below, give some reason to doubt whether the data is fully representative of the financial order business of the courts included, and so by extension of the jurisdiction-wide picture.

<b>Reason for exclusion</b>	<b>Number excluded for this reason</b>
No final financial order made <sup>158</sup> or order made but not located in file	11
Final financial order made outside reference period <sup>159</sup>	18
Duplicate – case appeared on list twice	2
File missing or unavailable	19
Event recorded on FamilyMan at relevant date not a final financial order (such an order either made earlier or apparently not made at all) <sup>160</sup>	30
Application withdrawn during attempted reconciliation	2
No financial documentation (D81, Form E or equivalent) on file to contextualise the order	2
Civil partnership file	5
<b>Total excluded:</b>	<b>89</b>

<sup>156</sup> There is some slight variation in the date of the most recent file from which data was collected for each tranche of cases in the different courts, but the basic principle of the time period (pre or post new FPRs) were the same. By contrast, different caseloads in each court necessarily mean that the date of the earliest file included in the dataset varies substantially: in the busiest courts in the survey, 50 orders were made within the space of a month; in the least busy court, a time frame of around four months was required to reach the target 50 cases for each tranche.

<sup>157</sup> No other data was collected regarding excluded cases, and the data was recorded in aggregated form, rather than by case.

<sup>158</sup> Including one order revoked as a nullity. Counted here also is one application under Part III of the MFPA 1984 for financial relief after a foreign divorce where the order was not on file.

<sup>159</sup> In these cases, the date of the order on file appeared to be different from that on the FamilyMan system. There may have been some inconsistency here in whether cases were entered on FamilyMan by reference to the date on the order itself (which is sometimes back-dated) and the date on which the order was actually made; the researchers may in turn have been inconsistent on some occasions in selecting cases by reference to the latter date rather than the former.

<sup>160</sup> E.g. dismissal or variation of periodical payments order made at earlier date; application for enforcement or under liberty to apply provision of order made at earlier date; amendment, including under slip rule, of order made at earlier date.

## Limitations of dataset

The researchers could not achieve a statistically representative sample because it was not possible to generate a random sample from a known population. As is common for court file surveys, the researchers instead sought to provide a sample of cases stratified by court and time, giving a reasonable spread of different court type/size and geographical location to provide largely descriptive statistics regarding the cases that were found there. The researchers cannot claim that the selection of cases is statistically representative of all divorces<sup>161</sup> or even all divorces with a financial order in England and Wales.

Most pragmatically, the data collection was dependent on obtaining access to courts, and not all courts approached were able to take part in the study for various reasons. But there were (and remain) other impediments to achieving such a sample. Jurisdiction-wide data are now published on the number of financial remedy disposals / applications per court.<sup>162</sup> Since the researchers undertook the data collection, data have been published on the proportion of cases jurisdiction-wide (rather than by court) which are decided following an initial application for a consent order, a contested application which results in a consent order and those that are adjudicated.<sup>163</sup> However, the researchers do not know from those data the number of complete final orders (as opposed to individual disposals) for each court<sup>164</sup> or the proportion for each court of pure consent orders, contested applications which settled and adjudicated outcomes. What can be said is that the four courts included in the study all had numbers of disposals above the jurisdiction-wide mean and median for 2011 (Q3),<sup>165</sup> figures published before the participating courts had been confirmed.

Moreover, there is a known problem with official data which also affected the coverage of the survey, of which the researchers did not become aware until after the data collection.

HMCTS identified cases to be included in the survey via its electronic case management system, FamilyMan, using event codes 'ARAPP' together with 'ARORD' or 'CON'. There is a known issue with use of event code ARAPP to identify cases for the survey that also impacts on published statistics: courts do not systematically record the application event and so table 2.9 of MOJ (2013) shows a number of applications estimated to be 10-15% lower than actual

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<sup>161</sup> Not least since it is known that only about 38% of divorces also have a financial order: see n 108 above.

<sup>162</sup> Disposals were recorded in the 2011 Q3 table on "family courts and mediation". A "disposal" for this purpose is a particular type of order (e.g. for periodical payments, for property adjustment) and so one complete order will typically contain more than one such "disposal". So these statistics did not count complete orders, but the numbers of disposals may serve as a rough indicator of the total number of complete orders per court. By contrast, the more recent Family court transparency tables available at MOJ (2013), instead record applications rather than disposals.

<sup>163</sup> MOJ (2013), table 2.9: these data record complete orders, rather than disposals within complete orders.

<sup>164</sup> See n 149 above.

<sup>165</sup> *Ibid*, 2011 Q3 statistical report.

applications, and the researchers have recently become aware from MOJ statisticians that pure consent order applications are those most likely to be omitted.<sup>166</sup> The survey, like the official statistics, may accordingly have fewer pure consent order cases than are actually in the whole population of financial order cases.

Putting aside the ARAPP problem, if the dataset were representative of the jurisdiction-wide picture (as depicted by published figures for 2011),<sup>167</sup> the researchers might have expected a breakdown of roughly:

- 28 adjudicated cases (7.2%)
- 100 originally contested cases which settled (24.7%) and
- 272 wholly uncontested cases (68%).

As it is, we have an achieved sample (N=399) of:

- 19 adjudicated cases (c.5%)
- c.120<sup>168</sup> contested but settled cases (c.30%) and
- 260 simple consent order cases (c.65%).

The figures are not markedly different from the jurisdiction-wide picture and numbers are relatively small so some variation is to be expected. But that said, there may – for two linked reasons – be an over-representation of ‘contested but settled’ cases and an under-representation of adjudicated outcomes in the data. First, one of the courts had a substantially higher proportion of contested (but settled) applications than the other three courts, well above the jurisdiction-wide percentage (which accounts for the larger than expected proportion of ‘contested but settled’ cases), yet that court’s proportion of adjudicated outcomes was in line with the jurisdiction-wide percentage of such outcomes. It may be that that profile accurately reflects the business of that court: high rates of contested applications but high rates of settlement achieved. However, the second reason suggests one should remain cautious and not assume that a representative sample of financial order cases has been achieved. As the table above indicates, amongst those files excluded from the study were (i) 19 files that were either missing or not available and (ii) 30 files in which

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<sup>166</sup> This is now noted on the published tables, which are released without any adjustment: see MOJ (2013), notes to table 2.9 and most recently note 3 to table 2.6: <https://www.gov.uk/government/publications/court-statistics-quarterly-april-to-june-2013>, in the third link on that page [last accessed 4 November 2013].

<sup>167</sup> MOJ (2013), table 2.9. There appears to have been some increase in the proportion of cases which are contested and adjudicated nationally in the last few years: in 2008, the most ‘consensual’ year in the 2007-2012 period, 73% of applications were consent cases and just over 5% of cases were adjudicated. Given the ARAPP problem discussed above, if one supposes that there are 10% cases missing and that these are all pure consent order cases, when one would have 300 (68%) such cases in the dataset, rather than 260 (65%), and official statistics for 2011 would record c 70% consent orders, rather than 68%, with accordingly lower overall proportions of contested but settled and adjudicated cases.

<sup>168</sup> This includes two cases in relation to which it is unclear whether the final order was by consent or not. If those cases were in fact adjudicated, there were 5.2% adjudicated cases (21), rather than 4.7% (19) and 29.5% contested but settled.

the event logged on FamilyMan at the relevant date was one which post-dated the original financial order (made some time earlier) which was intended to end the case. It follows from issue (ii) that an unknown number of cases in which a final order had been made in the time period the researchers were examining would not appear on the HMCTS list for that period and so escaped attention: they would have been logged against their later event. As for issue (i), the files which were missing or not available, the researchers do not know why these files were absent. It is likely that at least some were in the midst of some post-order activity (and so might in due course not have appeared on the list at all because of issue (ii)). In some cases, that activity will have been 'benign', e.g. an application for decree absolute following conclusion of the financial case, a slip-rule amendment, or an application prompted by suddenly changed circumstances out of both parties' control frustrating the order. But in other cases, the ongoing issue may have been an appeal or other challenge to the financial order by a dissatisfied party or an application for enforcement of the order. And it may be – the researchers cannot say from the data one way or another – that particular types of cases, e.g. more heavily conflicted (and adjudicated?) cases, are more likely to involve such activity. But if that were the case the dataset would be 'missing' a number of adjudicated outcomes.

For all these reasons, the researchers cannot safely claim that the dataset is statistically representative of the jurisdiction-wide picture. Conversely, the researchers may also have missed a number of consent order cases, given the known problem with the ARAPP event code, but this is a problem shared with the published statistics.

### **Form of data collection**

The data was extracted from information available on the court file and recorded manually on paper data collection sheets. These in large part mirrored data points on relevant court forms and so were relatively simple to complete, but some questions required those collecting data to attempt to identify (from a potentially wide range of sources) issues such as the stage at which settlement was reached and what legal support each party had during the case. The data was then inputted into an SPSS database for analysis. The project was designed and data collected some time before the LIPs study commenced or was even in prospect. Some of the data has been specifically recoded (in some instances, going back to the original data collection sheets) in order to create variables suitable for analysis in the LIPs study.

### **Types of analysis conducted**

As discussed above, the aim of the project was essentially descriptive and the data collected cannot safely be regarded as representative of the jurisdiction-wide population of financial order cases following divorce. So the data was largely analysed (using SPSS) and reported

in terms of frequencies, rather than by using techniques suited only to random, representative samples from which it is possible to make claims about the whole population of such cases.

### **Ethical considerations**

Access to family court files is obtainable only following an application to HMCTS's Data Access Panel and grant of a Privileged Access Agreement from the President of the Family Division, and subject to conditions imposed in the permission granted, including compliance with data protection legislation. The ethical aspects of the study were subjected to scrutiny by an Ethics Committee at the University of Bristol. No names, addresses or other contact details of parties, their children or other relatives, other third parties, legal representatives/advisers, or judges were collected. All data was pseudonymised at the point of collection under unique project case file numbers. The linking documents which connected those numbers with actual court file numbers were stored separately from the data and have since been destroyed, thereby anonymising the data. The specific court locations and time periods from which data was collected will be kept confidential by the project team. All data is reported in such a way as to preclude any possibility of individuals being identified.

## Appendix D

### Secondary analysis from the ‘mapping paths to family justice’ project

This project<sup>169</sup> investigated awareness and experiences of three forms of out-of-court family dispute resolution: solicitor negotiations, mediation and collaborative law. It aimed to determine, among other things, which forms of dispute resolution were best suited for which kinds of parties and cases. The methods used included a national survey, and qualitative interviews with 40 practitioners and 96 parties who had used at least one of these forms of dispute resolution since 1996 (when mediation first became generally available in England and Wales).<sup>170</sup>

Of a total of 96 parties interviewed, one third (32) experienced court proceedings in addition to out-of-court dispute resolution. In eight of these cases either the party interviewed (6), the other party (1) or both parties (1) represented themselves in court. The cases involving LIPs were therefore predominantly semi-represented rather than non-represented. Six of the cases concerned children, one finances and one both. The predominant experience for LIPs was of partial representation (7) rather than complete lack of representation (1), with parties having quite varied patterns of and reasons for representing themselves.

Several of these cases involved more than one attempt to resolve the matter by ADR before going to court:

- mediation offered but refused by one of the parties (4)
- mediation attempted but unsuccessful (2)
- unsuccessful solicitor negotiations (4).

Parties’ pathways into and out of court proceedings were varied and complex. The following examples reflect something of the range of experiences:

Helen was divorced in 2007, sorted out issues directly with her ex-husband at the time, but a dispute about contact subsequently arose in 2012. Helen’s ex-husband’s solicitor instigated mediation and Helen received a letter and a phone

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<sup>169</sup> ESRC RES 062-23-3184, University of Exeter, July 2011-June 2014, Investigators Anne Barlow, Rosemary Hunter and Janet Smithson.

<sup>170</sup> Results of the national survey are reported in Barlow et al. (2013) and an overview of key findings of the study as a whole is provided in Barlow et al. (2014).

call from a mediation organisation but she refused mediation. She did not want to be in a room with her ex-husband, considered it would be “like talking to a brick wall”, and was also concerned about the cost of mediation. Her current husband had gone to mediation as part of his separation from his ex-partner and did not recommend it, saying it was just “an argument you pay for”. Helen’s ex-husband then initiated court proceedings and Helen refused to get a lawyer because she considered them a waste of money. Again, her current husband had paid for a solicitor and his experience put her off. At the first court hearing, her ex-husband’s solicitor persuaded her to go to a MIAM, but she felt she was getting “the hard sell” from the mediator and again rejected mediation. She knew she would have to reinstate contact eventually and ultimately agreed with her ex-husband’s solicitor that she would do so on a limited basis. (006 Helen)

Leo separated from a cohabiting relationship in 2004. Things were alright at first, but a contact dispute arose in 2005. He and his ex-partner decided to try mediation, but he felt the mediator was biased towards his ex-partner and felt bullied into an unsatisfactory agreement as the only basis on which his ex-partner would allow him to have contact. He instructed a lawyer and issued court proceedings, and his lawyer attempted unsuccessfully to negotiate an agreement with his ex-partner’s solicitor before the first hearing date. After a number of directions hearings at which Leo felt the matter was not getting anywhere, he sacked his lawyer, became a LIP, and managed to get a court order for contact in 2007. He has subsequently gone back to court twice as a LIP to vary the contact order as the child has got older and circumstances have changed. (012 Leo)

Henry was divorced in 2007. His ex-wife left the matrimonial home but the children refused to go with her so she immediately issued residence proceedings. She had a solicitor but he was not eligible for legal aid and couldn’t afford a lawyer so appeared as a LIP. She made allegations that he had abused the children, and there were various Cafcass reports. When the matter was going to final hearing the Cafcass officer told him he must get a lawyer, which he did, although it was very expensive. The lawyer advised there was no point trying to negotiate with his ex-wife’s solicitor, so the final hearing proceeded and the court made a residence order in Henry’s favour. Subsequently, in 2011, he and his ex-wife attended mediation to deal with financial issues and were able to reach agreement by a combination of direct negotiation and mediation. (022 Henry)



Iris separated in 2008/9 and was divorced in 2012. She and her ex-husband both instructed solicitors. Her ex-husband refused to communicate directly with her but would only do so through the solicitors. However Iris was not eligible for legal aid and could not afford to keep paying her solicitor each time her ex-husband raised a new issue. Her ex-husband's solicitor proposed mediation, but Iris refused since he was refusing to tell her what arrangements he wanted so she did not know whether they were actually in dispute. Her ex-husband then issued court proceedings. She appeared as a LIP, partly because she couldn't afford a lawyer and partly because she felt she wanted to deal with the matter herself. Although her ex-husband had a solicitor, he appeared at hearings in person. They agreed supervised contact and then unsupervised, and the court ordered them to attend mediation. Both attended MIAMs, but her ex-husband refused to engage any further, and eventually dropped his contact application as the children did not want to see him. Iris then issued ancillary relief proceedings, attempted to negotiate directly with her ex-husband's solicitor, appeared as a LIP at the first appointment, but instructed a lawyer for the FDR. The judge at the FDR indicated that her offer was reasonable and her ex-husband then accepted it. She still receives letters occasionally from her ex-husband's solicitor regarding contact, but she simply maintains that if he wishes to discuss contact he should speak with her directly. (034 Iris)

The interview sample also included a party with a long-running contact dispute (since 2004), who had dispensed with two lawyers whom he felt were not pursuing his interests sufficiently robustly. He had found a McKenzie Friend whom he considered much more helpful, and now himself acted as a McKenzie Friend to help fathers pursue shared residence. He did not advise them to try mediation because "it doesn't work. The mediation is not legally binding. You can have an agreement in mediation, it's immediately broken and in the courts anyway." (085 Terry)

Although it is difficult to generalise from these stories, a few points may be drawn from them, as well as the wider sample with court experience:

- court proceedings often take place against a background of failed attempts at out-of-court dispute resolution.
- there are multiple reasons why mediation may be rejected or may fail (e.g. cost, fear of ex-partner, lack of trust, lack of incentive to change the status quo,

unwillingness to compromise, lack of emotional readiness, resistance to pressure, perceptions of bias, unenforceability of agreements).

- court proceedings are necessary when the parties are unable to communicate, when a dispute is intractable and/or to determine disputed factual allegations.
- parties may be able to negotiate together over some issues but not others.
- the passage of time and the intervention of court proceedings may sometimes make it easier to negotiate rather than more difficult.
- LIPs' pathways into litigation are both widely varied and appear to resemble the pathways of represented parties rather than displaying any particular common or distinguishing features.

This secondary analysis therefore provides two key messages for the main study. First, it cannot be assumed that litigants in court have not first attempted to resolve their dispute out of court. Out of court dispute resolution has often been attempted prior to court proceedings. Secondly, where out of court dispute resolution is attempted, it is not always successful; in such cases, court proceedings may be the only option remaining to resolve the dispute.