

LEGAL AID AND UNREPRESENTED LITIGANTS : A REGISTRAR'S PERSPECTIVE

By Registrar Catherine Cashen, Family Court of Australia, Third National Conference Hotel Sofitel Melbourne, Tuesday 20 - Saturday 24 October 1998

Much has already been said about the cutbacks to legal aid and the increasing number of unrepresented litigants.

I intend to focus on the impact that unrepresented litigants are having on the Registrars of the Family Court. Although I believe it is safe to say that given the spectrum of roles and duties undertaken by Registrars within the court that Registrars are really the litmus paper for the whole court.

I will firstly briefly explain the role and position of Registrars within the Family Court.

Registrars are legally qualified officers of the court with specialist skills in the areas of negotiation and communication. Since the inception of the court Registrars have been used as and relied upon as negotiators and conciliators and most recently as mediators. Further, the rising recognition of such procedures as dispute resolution tools has strengthened and enhanced the role of Registrars.

In addition, Registrars undertake a wide range of other duties and roles but all are aimed at assisting the court in its primary function of resolving family disputes.

Registrars are currently banded into Deputy Registrars (of which there are approximately 50 in the court) and S37A Court Registrars (of which there are approximately 20 in the court).

Deputy Registrars deal with a range of matters including:

- Information sessions;
- Duty Registrar work on the front counter, including assessment of urgent applications and phone queries;
- O24 Conciliation Conferences (dealing with financial issues);
- Joint Conferences (dealing with child and financial issues assisted by a Counsellor);
- Mediation (child and financial issues);
- Taxations;
- Pre-Hearing Conferences and Compliance Conferences;
- Appeals;
- Parenting plans;
- Consent orders.

S37A Court Registrars deal with court work including:

- Duty lists in interim matters of which there were approximately 45,000 last year;
- Divorces of which there were approximately 53,000 last year;
- Directions hearings for final order applications;
- Maintenance hearings and maintenance and property enforcements.

In terms of contested decision making Registrars are restricted to procedural matters and maintenance and enforcement hearings.

Thus, while Registrars undertake a wide range of duties within the court their main workloads do not involve substantive judicial decision making.

However, with the Court's ever rising workload and the flow on consequences of same Registrars have increasingly become the face of the court – "the shop front".

The Family Court deals with over 100,000 litigants per year (excluding children) most if not all of these litigants will have contact with a Registrar in at least one and probably more of the Registrar's various roles. Many such litigants will have no contact with a Judge or Judicial Registrar.

The other papers have dealt with the facts surrounding and the consequences of legal aid cutbacks however, I wish to set the scene as regards the impacts of legal aid cuts on Registrars.

I understand that the cuts to legal aid introduced by the Federal Government have had a profound affect on the ability of legal aid services to function.

The South Australian Legal Services Commission faced a 30% reduction of aid in 1996, this was reduced but the overall result has been a drastic cut in funding and at a time of general economic upheaval and social stress when it could be expected that the demand and need for legal aid would increase.

In addition, as the new Commonwealth/State arrangements are on an individual basis the situation may exist whereby the provision/availability of legal aid may, and I believe does, vary across States. An application for funding for contact may be granted to an applicant in New South Wales but denied to an applicant in Victoria or the respondent may be denied aid in South Australia.

Add to this the Federal nature of the Family Court plus our mobile society, and confusion and anger arises impacting on both the litigants and ultimately the court.

Further, the cuts to funding have been across the whole spectrum of legal aid services including the provision of legal advice and duty services.

This has resulted in litigants not only being unrepresented but devoid of legal advice and often angry and frustrated at their lack of ability to get advice.

I hate to think how many times Registrars have had to explain to such unrepresented litigants that they can not provide them with legal advice, that they can not run their case for them, that they can not prepare their application and affidavits nor negotiate nor write letters for them.

Also the introduction of drastically reduced funding caps and strict composite lump sum payments for specified stages in court work has resulted in the phenomenon of transient representation. This is demonstrated by represented litigants becoming unrepresented and

or temporarily unrepresented or represented sometimes and not other times or represented for some applications but not others, or not represented until later in their proceedings.

This lack of certainty of legal counsel has obvious impacts on both the court and all the litigants in each particular matter.

Registrars are often faced with trying to ascertain whether there is a lawyer acting or not and there are often delays involved in such matters and the need for adjournments.

Recently created unrepresented litigants are often in a pitiful state for in one stroke all their legal support has gone and they are usually legally at a loss and emotionally lost. Further, if they believe, rightly or wrongly that the other party has deliberately protracted proceedings to use up their aid – they are angry and bitter.

I imagine these litigants must feel like a patient left on the operating table half way through an operation when the surgeon departs. Comments from self represented litigants support his view.

"Funds run out: legal aid should cover from the start of the case to the end and not finish half way through."¹

There are also more far reaching impacts on the court due to funding arrangements for increasingly anecdotal evidence suggests that lawyers are declining to act for legal aid clients or acting but not providing as good a service because they reason there is too little money paid to them.

This may result in the "better" lawyers (who can attract other better paid work) leaving legal aid work perhaps to the less experienced. This may impact on the standard of legal representation given to legal aid clients, a group who in my experience often need the "best" lawyers not the "worst" and or the most inexperienced. Or it may result in more of the most difficult matters being dealt with in house therefore impacting upon legal aid lawyers and ultimately their ability to represent litigants.

Further, Registrars are often making directions which are ignored and excuses are often based on the problems and consequences of legal aid funding:

" – my client's funding has been used up; they will have to act for themselves from now on; if I comply with that direction my client will have less aid, less money available to argue . . . , it's alright for the applicant they are legally aided I can't get aid, I can't get help . . . "

In addition, unrepresented litigants sometimes don't appear in court, there may be a phone message to the front counter, a scrawled note to the effect that "car broke down", "no bus money", "father died", or a message with the other party requesting an adjournment.

But I am often surprised at how accepting the other party is on a non attendance especially if they are also unrepresented. Whilst a flat tyre or lack of money for bus fare may seem an unlikely reason to me to adjourn proceedings it appears that in the every day reality of many unrepresented litigants' lives it is both expected and accepted. Unrepresented litigants do not act like or behave like lawyers.

It appears obvious to me that it is better for both litigants and the court that litigants be represented so what is it that a lawyer brings to the court and are there any ways that the lack of a lawyer can be masked so as to reduce the impact of their absence.

In an ideal world a lawyer is a trained legal specialist who knows the relevant law and practice and procedures of the court. He/she can be relied upon to manage their client's case,

including the giving of legal advice and direction to their client in the most appropriate manner whilst instilling in their client realistic expectations and options and an understanding of the court and the court processes.

Further, he/she can be relied upon to present their client's case and their clients in the best possible manner clearly, articulately and succinctly whilst maintaining in themselves, their clients and their clients associates a level of civility and fair play both to the court and the other parties, devoid of actual or latent physical or verbal violence or threats.

Good lawyers bring a lot to their clients and to the court and their absence leaves a big void. The reality of the situation is that the unrepresented litigant has little or no hope of filling their lawyer's shoes. That is not to say that unrepresented litigants can not successfully appear in court and the court has gone a long way in simplifying its procedures and transferring information to its clients (information sessions and pamphlets) however, I find the comments credited to Murphy J in the criminal case of *McInnes v The Q* enlightening:

" . . . an unrepresented accused is always at a disadvantage not merely because they might lack sufficient knowledge or skills but because they can not assess their case with the same dispassionate objectivity as the Crown."²

Dispassionate objectivity are not words that immediately spring into my mind when I think of unrepresented litigants.

In practice Registrars are often confronted with unrepresented litigants who have no or at least only a little legal knowledge and that often acquired from dubious sources – (e.g. mates at work) – and who have little understanding or appreciation of the legal process that they are involved in.

Add to this background the fact that unrepresented litigants bring to the court their own personal baggage, their own abilities, attributes and characteristics which may be affected by and include any but not limited to the following: their age, sex, their life experiences, primary language, educational level, ability to successfully communicate, knowledge of the court, expectation of the court, their physical and mental health, their cognitive ability, their emotional state, the level of their fear as regards the court process, their fear of the other parties including actual or threatened physical violence, their own perceptions of fault as regards the dispute, their financial position, their support network or lack thereof, their level of preparedness including the actual time that they had to prepare themselves, how they are on the day, their coping and control mechanisms including anger and their preferred model of communication and or dominance.

Add to this emotional and psychological deficit/crisis because we all know that people don't function particularly well when their relationships break down.

Plus it must be borne in mind that the above scenario exists for each unrepresented litigant and unless a matter is undefended there will be at least 2 parties and often more and all may be unrepresented. In addition there are of course the group dynamics operating between all the parties in each particular matter.

One could perhaps be forgiven for thinking that dealing with unrepresented clients is all too hard and sometimes I believe it is.

My adrenalin still rushes when in a duty list of 30 plus matters, the file boxes are handed up and I am confronted with a group of 5 unrepresented litigants and I know that legal aid is finished, (even for the child representative), and that they can't agree on anything and that child abuse is an active factor. I might spend 15 minutes trying to ascertain who are the parties and what the dispute or disputes are about but I am not the one who will have to hear the dispute.

Fortunately the reality of unrepresented litigants is often less daunting.

For the Registrar's ability to manage unrepresented litigants is determined by a mix of factors including:

- the function or role that the Registrar is undertaking e.g. conciliation conference, or heavy duty list;
- the severity of the particular dispute e.g. venue for contact handover versus child abuse;
- the mix of the other litigants whether they are represented and or whether there is a child representative;
- the characteristics/attributes of the unrepresented litigants – articulate and rational to borderline personality disorder and angry.

Perhaps the most outstanding impact of unrepresented litigants on Registrars is time. For no matter what happens to or what an unrepresented litigant's application relates to, it will take extra time for the Registrar to deal with it. In duty lists where an estimated 35% of litigants may be unrepresented this has a profound impact not only on the Registrar and the court but also other litigants of the court.

Lawyers get impatient with having to wait, they and their clients often resent the extra time and assistance provided (by necessity) to unrepresented litigants.

The Registrar often has to walk a fine line between making sense of the unrepresented litigant's application and appearance and not appearing to become embroiled in their actual matter.

The risk is that litigants may perceive the extra time and assistance provided as being unfair and biased against them especially if they are having to fund their own lawyer. Registrars can not be seen to be favouring unrepresented litigants.

Sometimes the extra time spent may resolve the dispute and then it can be said that it was time well spent but sometimes the extra time achieves little, the unrepresented litigants themselves or the nature of the dispute means that the matter must proceed – in those circumstances frustration reigns.

Unrepresented litigants are litigants without lawyers and it shows and as the number of unrepresented litigants grows the resultant problems for and impact on the court and the Registrar will undoubtedly increase.

Footnotes

1. Family Court of Australia, 1998, Study of the Effects of Legal Aid Cuts on the Family Court of Australia and its Litigants Preliminary Report October 1998, pg. 30.
2. Catholic Commission for Justice, Development and Peace Occasional Paper No. 4 September 1998 pg. 4 *McInnes v The Queen* (1979) 143 CLR 575 at 590.