

JERSEY / JUDGMENT

B v J [2008] JRC 102 (23 June 2008)

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judgment

the bailiff: 1. A short point of judicial policy has arisen in relation to the costs incurred by the children's representative in this case. Mr Hanson, assisted by Mrs Corbett, appeared as the children's representative, and thought that it would be beneficial if I were to set my findings down in a short judgment so that the profession might be aware of the court's general approach in this situation. 2. The power to appoint a children's representative in family proceedings is a new one. It was introduced by Article 75 of the Children (Jersey) Law 2002, and is in the following terms:- "Representation and assistance for children (1) Where it considers it desirable in the interests of a child to do so the court may order- (a) that the child be separately represented in such proceedings under this Law as the court may specify; or (b) that the child be assisted and befriended by such person, being a person independent from the Minister, as the court may specify. (2) Where a child is empowered to bring any proceedings under this Law - (a) The child may not do so without leave of the court and the court may only grant leave if it is satisfied that the child has sufficient understanding to bring those proceedings; and (b) The child may only act through a guardian ad litem appointed by the court. (3) Without prejudice to any other power of the court to make an order for costs against any party to proceedings, where a child has been granted legal representation under a legal aid certificate for any proceedings under this Law, the court may order that the costs of such representation be paid - (a) out of public funds; or (b) where he or she has been given an opportunity to be heard on the question of costs, by any person with parental responsibility for the child who is not a party to the proceedings. (4) The amount of costs that the court has ordered to be paid under paragraph (1) shall be determined in accordance with Rules of Court made under the Royal Court (Jersey) Law 1948 and where the costs are to be paid out of public funds, such amount shall be paid from the annual income of the States." 3. The overriding power to which reference is made in Article 75(3) is contained in Article 2 of the Civil Proceedings (Jersey) Law 1956 which provides that "the costs of and incidental to all proceedings in the Royal Court shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs are to be paid". 4. I am not concerned at this stage with the costs of the parents because that matter has been left over. I am only concerned with the costs of the children's representative who was appointed at the request of the Deputy Bailiff having regard to the complexities of the case at that time. Allegations of sexual abuse had been made against the father and it was important that the voice of the children should be heard, and their interests represented separately from those of their parents. 5.

Although the court retains a discretion to order that the costs of the children's representative should be paid by one or both of the parents (or indeed some other person), it will be very rare that such an order is made. The legislature has clearly envisaged, notwithstanding the existence of a legal aid scheme whereby members of the profession provide representation pro bono or at a reduced cost, that an order can be made for the costs to be paid out of public funds where a legal aid certificate has been granted. It is a curiosity that the power can only be exercised where such a certificate has been issued. The point does not arise in this case because a legal aid certificate was granted to Mr Hanson. One can envisage, however, circumstances where very senior counsel, not subject to the obligations to the legal aid scheme might be invited to undertake this rôle. Indeed Mr Hanson himself was not obliged pursuant to the legal aid scheme to accept this certificate, but volunteered to assist because of his experience in these matters. It seems wrong that the courts power to order that the costs of the children's representative be met out of public funds should be trammelled in any way at all. The purpose of the statutory provision is to ensure that the children's interests are independently and properly represented. I can see no reason why the words "where a child has been granted legal representation under a legal aid certificate for any proceedings under this Law" should have been included in Article 75(3). I express the hope that the Minister for Health and Social Services might consider whether the States should be invited to consider the amendment of this provision.

6. Be all that as it may, my reasons for concluding that the costs of the children's representative should ordinarily be paid out of public funds are as follows:- (i) In circumstances where the parents have no right to veto the appointment of a children's representative, nor any part to play in the appointment or dismissal of such a representative, it seems unfair that they should be compelled to meet the costs involved. (ii) Article 2 of the Children (Jersey) Law 2002 provides at paragraph (1) that:- "When the court determines any question with respect to - (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration". To require parents to pay the costs of the children's representative is likely in most cases to diminish the funds available to support the children. It is true that Article 2(1) does not expressly refer to costs; however, in exercising its discretionary power, the court cannot in my judgement ignore the fact that in many cases an order against the parents would damage the welfare of the children. (iii) It is important to ensure that the children's representative can give independent advice to the court which truly represents the interests of the children and is unaffected by the interests of either parent. Such independence is more likely to be assured if the children's representative knows that his or her costs are to be met out of public funds rather than a parental purse.

7. For all those reasons I order that the costs of the children's representative be paid on the indemnity basis out of public funds. This order will not come into effect for four weeks in order to allow the Deputy Judicial Greffier and the Attorney General to whom a copy of this judgment will be sent, both of whom shall have liberty to apply, to make such representations as either of them may think fit.

Authorities Children (Jersey) Law 2002. Civil Proceedings (Jersey) Law 1956. Page Last Updated: 15 Mar 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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Prepared on 26 October 2026 · Esheria