Case No: BV 17 D 30182

IN THE FAMILY COURT SITTING AT
THE CENTRAL FAMILY COURT

Date: 5th March 2021

Before:

RECORDER ALLEN QC

- -

Between:
WL

Applicant

-and-

HL

Respondent

- -
- -

Ms Cecilia Barrett instructed by Goodman Derrick LLP for the applicant
Ms Felicity Goldsbrough instructed by Shakespeare Martineau LLP for the respondent

Hearing date: 16th December 2020

JUDGMENT

1. On 1st June 2018 His Honour Judge Meston QC made a final order by consent in financial remedy proceedings between WL and HL following their short marriage which lasted between February 2015 and separation in October 2017.

2. The financial order contained an obligation that HL pay WL for the benefit of the parties' child, CL, born in February 2017, one-half of her nursery costs and, from the date that CL started primary education, one half of her reasonable childcare costs.

3. In June 2020 CL's full-time nanny, who she had had since birth, resigned. Thereafter WL engaged more *ad hoc* childcare including a local childminder, a friend's au pair, a school friend's nanny, and a babysitter. HL ceased making childcare payments. This led to WL issuing an enforcement application in Form D50K on 20th August 2020 seeking (as at that date) £758.00.

4. This application came before me on 16th November 2020. The sum claimed had increased to £3,788.50 as at the end of October 2020. With some considerable reluctance given its merits (and that there was no issue of affordability) I dismissed the enforcement application. I concluded that given the way in which the obligation had been drafted HL was not in breach of the letter of the order as his obligation to meet reasonable childcare costs only arose from the date that CL started primary education and breach of the spirit of the order could not fairly ground enforcement. I reserved any future hearings made by either party to vary the terms of the financial order to myself in the first instance.

5. Unsurprisingly my judgment led to WL issuing an application in Form A1 dated 19th November 2020 for (i) variation of the financial order of 1st June 2018 as it related to payments for pre-school childcare for CL; and (ii) a 'top up' order under CA 1989 Schedule 1 to assist WL in meeting the costs of caring for CL (HL being subject to a CMS maximum assessment of £1,098 pm). On 9th December 2020 WL issued a Form D11 Application Notice seeking an interim variation of the financial order to ensure (it was said) that WL could continue to meet her childcare costs pending determination of the substantive application.

6. These two applications came before me on 16th December 2020. I acceded in part to the interim variation application and ordered HL to make backdated payments for nursery costs of £517 pm from 9th December 2020 (being the date of WL's application) and £645 pm from 1st January 2021.

7. The remaining dispute between the parties was principally whether the parties should reemploy a nanny and if so whether the cost should be shared between them and in what proportions given that both were in well-paid full-time employment (HL disclosing a net income of £16,197 pm and WL a net income of £5,100 pm).

8. The parties' Forms H stated that together they had already incurred more than £15,000 in costs and estimated incurring a similar sum by the FDR Appointment. It was therefore clear to me that the parties' expenditure on costs was already disproportionate to what was in

dispute.

9. In consequence I exercised my case management powers under FPR Part 3.

10. Rule 3.3 states:
(1) The court must consider, at every stage in proceedings, whether non-court dispute resolution is appropriate.

Rule 3.4 states (so far as is material) as follows:

(1) If the court considers that non-court dispute resolution is appropriate, it may direct that the proceedings, or a hearing in the proceedings, be adjourned for such specified period as it considers appropriate –

(a) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and

(b) where the parties agree, to enable non-court dispute resolution to take place.

(2) The court may give directions under this rule on an application or of its own initiative.

(3) Where the court directs an adjournment under this rule, it will give directions about the timing and method by which the parties must tell the court if any of the issues in the proceedings have been resolved.

(4) If the parties do not tell the court if any of the issues have been resolved as directed under paragraph (3), the court will give such directions as to the management of the case as it considers appropriate.

11. These rules were considered in *Mann v Mann* [2014] 2 FLR 928 by Mostyn J at [25]–[28]. He identified where r.3.4 (then r.3.3) differed from the Civil Procedure Rule 1998 r.26.4(2A)[1] and, in particular, noted that the power under the FPR to adjourn so as to enable non-court dispute resolution to take place, while capable of being exercised on the court's own initiative, can only be exercised where the parties agree whereas, under the CPR counterpart, the court can impose a stay in favour of ADR whether the parties agree or not. Mostyn J suggested at [28] that the Family Procedure Rule Committee give consideration to deleting the words *"if the parties agree"* from (now) r.3.4(1)(b) so that it was put on the same footing as its CPR counterpart. This amendment has not yet been made.

12. More recently, in *Lomax v Lomax* [2019] EWCA Civ 1467 the Court of Appeal held (on appeal from *Lomax v Lomax (Referral to Early Neutral Evaluation)* [2020] 1 FLR 30 per Parker J) – a case under the Inheritance (Provision for Family and Dependants) Act 1975 - that in the civil context the consent of the parties is <u>not</u> necessary for a case to be referred to Early Neutral Evaluation under CPR r.3.1(2)(m).[2]

13. Given that the costs of litigation were already disproportionate to the issues between the parties I considered that non-court dispute resolution was *"appropriate"* (r.3.3(1)). I

[1] If the court otherwise considers that such a stay would be appropriate, the court will direct that the proceedings, either in whole or in part, be stayed for one month, or for such other period as it considers appropriate.
[2] Except where these Rules provide otherwise the court may … take any other step or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation with the aim of helping the parties settle the case.

therefore directed that WL's applications be adjourned until 15th January 2021 (i) to enable the parties to obtain information and advice about, and consider using, non-court dispute resolution; and (ii) where the parties agree, to enable non-court dispute resolution to take place.

14. I further directed that the parties' solicitors send me a joint letter by 14th January 2021 setting out the outcome of the parties' engagement in, or endeavours to engage in, non-court dispute resolution together with a schedule of the dates of any offers made and responses received (but not revealing the content of those offers unless made on an open basis).

15. On 13th January 2021 I was informed by way of a joint letter from the parties' solicitors that the parties had agreed to go to mediation in an effort to resolve the issues between them and a first session had taken place on 11th January 2021. The mediator had indicated that she would wish the mediation sessions to continue for at least the next two weeks and the parties were willing to do that. No further offers had been made since 16th December 2020 although it was expected that this was something that would occur as mediation progressed. WL had provided the mediator with information on the costs of employing a suitably qualified nanny to provide care for CL whilst she was at work.

16. The parties' solicitors therefore asked that the applications remain stayed for a further two weeks to 29th January 2021 and that I would then be provided with a further joint letter. I acceded to this request.

17. On 29th January 2021 I was informed by way of a second joint letter that the parties had attended two mediation sessions. I was provided with the dates of offers made and by whom (but not the content thereof). The letter further said that although it was not initially possible for the parties to reach an agreement in mediation, discussions had continued and that *"it now seems that it may now be possible for an agreement to be reached given most recent discussions and proposals"*.

18. The parties' solicitors therefore asked that the applications remained stayed for a further two weeks to 12th February 2021 and that I would then be provided with a further joint letter. It was said that it was hoped in the intervening period to be able to submit a draft consent order dealing with the resolution of the outstanding issues but if that proved not to be possible the solicitors' would be seeking to have the matter set down for a final hearing. I acceded to the request for further adjournment but said I would decide what should happen thereafter once I had received the further update.

19. On 12th February 2021 I was informed by way of a third joint letter that there appeared to be a *"broad level of agreement"* between the parties as to how the outstanding issues should be resolved, but there was disagreement on how an order to reflect the agreement should be drafted. It was said that the parties' preferred option would be for the issue to be dealt with by the court as a paper exercise so that each party submitted a draft of the order they would wish to see made with written submissions in support. Alternatively, it was said the matter could be set down for a short further hearing, although the solicitors were concerned about the costs of doing so, or the applications could again be adjourned for a short period of time to see if the drafting issues could be resolved. I was asked to advise as to how the court wished to proceed.

20. On 13th February 2021 I replied stating that I was very keen for the drafting issues to be resolved consensually if at all possible. I therefore said I would continue the adjournment for

a further two weeks to 26th February 2021 in the hope that a draft order could be agreed before this date. If agreement had not been reached by that date then one draft order with the competing wording clearly highlighted and accompanied by concise written submissions cross-referenced to the competing wording was to be filed with me by 5th March 2021 and I would then determine the matter on paper.

21. I further asked both solicitors to advise their clients that (i) I was not bound to utilise either parties' preferred wording if I was asked to finalise the order; and (ii) either party may apply for an order that their costs of this exercise be met by the other and depending on how I determined the drafting issues in dispute I may well be persuaded to make such an order and summarily assess the same.

22. On 27th February 2021 and over subsequent days I received emails from both parties' solicitors which indicated that the parties were solely in dispute as to whether or not the order should (i) include an obligation that WL provide HL with copies of childcare employment contracts and invoices settled; and (ii) state that any childcarer employed should be in consultation and agreement with HL. Both parties subsequently modified their initial positions as to the precise wording they proposed. I was asked to determine this dispute on paper.

23. Both parties' solicitors agreed that (i) the parties were *Xydhias*-bound irrespective of my decision in relation to the issue I was being asked to resolve; and (ii) I was at liberty to adopt an alternative form of wording to that put forward by both parties even if this was in the form of a recital rather than in the body of the order.

24. Having considered the parties' competing submissions I determined the issue on paper on 5th March 2021 thereby finalising the order and bringing the proceedings to a conclusion. Both parties agreed to there being no order for costs.

25. I believe that my use of the court's FPR Part 3 powers in this case to encourage the parties to consider and enter non-court dispute resolution and my request for fortnightly updates assisted them in reaching settlement even though agreement was not reached in mediation but was reached thereafter between the parties themselves. My order took the matter out of the court arena and the inevitable focus on the next court hearing. It allowed the parties to maintain a direct dialogue rather it being conducted in writing via their solicitors (with the potential for polarisation and the inevitable increase in costs). It also allowed them to discuss with a third party and eventually agree a solution that worked for them as parents of their young child (rather than having one imposed) but, importantly, in the context of knowing that I was maintaining an overview of the progress of their negotiations.

26. Even though I ultimately had to decide a discrete issue on paper I am confident that adopting the approach I did led to a better, quicker and less expensive outcome than would otherwise have been the case.

27. I also consider that my use of the Part 3 powers furthered the overriding objective of enabling the court to deal with cases justly and in particular the obligation in r.1.1(2)(b) of dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues; (d) of saving expense; and (e) allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases. My use of these powers was also an exercise of my duty as set out in r.1.4 to further the overriding objective by actively managing cases which includes at r.1.4(2)(f) *"encouraging*

the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure".

28. Reference to FPR Part 3 was made in the Report of the Family Solutions Group (a subgroup of The Private Law Working Group chaired by Mr. Justice Cobb) dated 12th November 2020 (see Annex 10 C at p159-163). At paragraph 16 it was said [original emphasis]:

> **It would be helpful to gather data on the extent to which these duties and powers are applied.** Are there universal standards across the country or are differing courts adopting differing approaches? Concern has been expressed within our discussions and the wider PrLWG that the courts are not actively case managing in accordance with Part 3 of the FPR, and opportunities to resolve cases out of court are thus lost.

29. I therefore raised my use of the FPR Part 3 powers in this case with Mr. Justice Mostyn in his role as National Lead Judge of the Financial Remedies Courts. He asked that I record the same by way of a written judgment and that it be published on Bailii.

RECORDER ALLEN QC

5th March 2021