



Neutral Citation Number: [2024] EWHC 751 (Fam)

Case No: FD23F00074

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

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Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/04/2024

Before :

MRS JUSTICE JUDD

Between :

MB

Applicant

- and -

CD

Respondent

Katherine Kelsey (instructed by Payne Hicks Beach) for the Applicant
Simon Webster KC (instructed by AFP Bloom) for the Respondent

Hearing dates: 22nd March 2024

Approved Judgment

This judgment was handed down remotely at 2pm on 2nd April 2024 by circulation to the parties or their representatives by e-mail.

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MRS JUSTICE JUDD

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Judd :

1. This is an application for a legal services payment order with respect to both financial and Children Act proceedings. I will refer to the parties as the mother and father in this judgment rather than husband and wife, as they have been divorced for several years.
2. The parties were married in 2006 and divorced in 2016. They have one teenage child (A) who has significant special needs. He lives with the mother although he also spends substantial periods of time with his father.
3. The substantive applications for which funding is sought are (a) for enforcement of an order of HHJ Tolson which itself was a variation of an order of HHJ Wallwork (b) cross applications for a variation of that order and (c) child arrangements.
4. The financial issues are listed for a one day hearing in April. The Children Act proceedings are listed at the Central Family Court. The next expected hearing is a Dispute Resolution Appointment (“DRA”) but there is no listing for that yet. There have been hearings in the Children Act proceedings very recently.

The financial proceedings

5. In the financial proceedings the mother is seeking to enforce payment of sums amounting to £290,312, which are broken up as to £81,362 which are said to be arrears which have built up because the father has not increased payments in line with the RPI every year since the last order was made in 2018, £2,865.58 which he wrongly deducted from maintenance payments, £64,429.55 which it is alleged he failed to pay towards the child’s costs as provided for in the 2018 order, and £141,655 with respect to repairs which are needed to the home in which she and the child are living. She is also seeking to recover her costs.
6. The mother is also seeking a variation to that order to the extent of requiring the payments to be made on 1st of each month, and for a better and clearer mechanism for payment of expenses needed to meet the child’s special needs.
7. The father is seeking a variation of the order to remove any requirement to increase maintenance in accordance with the RPI, although he has only made this clear in the days before this hearing.
8. The mother is seeking a legal services funding order amounting to £143,499 excluding today’s costs with respect to the financial proceedings. This is for £58,072 in costs already expended, and £85,377 for costs going forwards.

The Children Act proceedings

9. The current proceedings are being heard at the Central Family Court and were issued in 2022. Until the beginning of 2024 the issue under consideration was whether the father should be able to take A to Country X (which is a non-Hague Convention Country) for holidays. This changed when the father issued urgent applications for an interim transfer of residence, which led to at least two hearings in March, and possibly an earlier hearing in January. The interim applications were refused, and the case has been adjourned for further evidence to be obtained, including for the mother to

undergo hair strand tests and a PETH test. There is to be a DRA but this has not been listed yet.

10. The mother is seeking the sum of £239,782 for the funding of these proceedings, £95,338 for costs to date and £144,444 for costs going forward. I note from 220 of the electronic bundle that the future costs are £61,653 to the DRA and £82,791 from the DRA.

The law

11. The test for granting the applicant an order for payment for legal services in financial proceedings is set out in s22ZA Matrimonial Causes Act 1973. The court has the power to make such an order by virtue of s22ZA(1). Under s22ZA(3) the court must not make an order under this section *‘unless it is satisfied that, without the amount, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings’*.
12. Ss(4) provides *‘For the purposes of subsection (3) the court must be satisfied, in particular, that –*
- a) *The applicant is not reasonably able to secure a loan to pay for the services, and*
 - b) *The applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.*
13. Ss (6) provides that an order may provide for a payment to be made by instalments and for them to be secured to the satisfaction of the court.
14. The leading case with respect to such payments is that of Rubin v Rubin [2014] EWHC 611 (Fam). My attention is specifically drawn to paragraph 13 wherein Mostyn J stated that:
- i) The court is required to have regard to all the matters mentioned in s22ZB(1)-(3)
 - ii) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings...thus an LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not be reasonably be able to obtain in the future appropriate legal services for the proceedings;
 - iii) The court would be unlikely to expect [her] to sell or charge her home or to deplete a modest fund of savings.
 - iv) Evidence of refusal by two commercial lenders of repute will normally dispose of any issue whether a litigation loan is or is not available.
 - v) Whether a Sears Tooth arrangement can be entered into (a statement of refusal by the applicant’s solicitors should normally answer the question).

- vi) The court will be better placed to assess accurately the true costs of taking the matter to trial after a failed FDR when the final hearing is relatively imminent and issues are more clearly defined.
15. My attention is drawn by counsel to four further authorities, namely BC v DE [2016] EWHC 1806, Re Z (Schedule 1 :Legal Costs Funding Order; Interim Financial Provision) [2020] EWFC 80, and R v R [2021] EWHC 195 (Fam) and DH v RH [2023] EWFC 111.
16. On behalf of the mother, Ms Kelsey submits that the statutory test and the test in Rubin are made out with respect to both the financial and Children Act proceedings. The mother has no income of her own and does not work. The maintenance order is for A. She has a modest amount of capital in the bank. She owns a three bedroomed maisonette which is worth (she says) £1.2m net of a £400,000 mortgage but, whilst she is not living there, is the only property she owns. If the conditions for living in the current home she shares with A are not met (the condition being that A needs it as a home) then she would have nothing else. Given the Children Act proceedings and the applications that the father has recently made there is a possibility that her residence in her current property could at some point be the subject of a challenge.
17. She is not able to get a litigation loan, or any loan on the security of her house, and her solicitors are not willing to enter into a Sears Tooth agreement. There is nothing in writing from the mother's solicitors to say that they would 'down tools' in the event that an order was not made but they cannot be expected to carry on in circumstances where they are already owed very large sums with respect to costs.
18. On behalf of the father Mr. Webster KC submits first and foremost that the application does not meet the relevant test in s22ZA(1) and as set out in Rubin. She has a very significant capital asset in the property that she owns, whether the valuation given by her is correct (which is very doubtful) or not. She has a home for herself with A, in a very good area of London, which is mortgage free. Whilst the father actually owns this property she has been living in it for many years. Even if child arrangements for A were to change it does not follow that it could be said that he no longer required the property.
19. In any event the parties both come from wealthy families, not just the father. The mother has been found to have given very unsatisfactory evidence in previous proceedings.
20. Mr. Webster also points out that the property owned by the wife is in a very desirable area of London. Even if she were to need to provide a roof over her own head, it would not need to be there. She could meet her legal expenses and move to another property which was not so expensive. She has a significant income in the maintenance she gets for A and, ultimately, she has made choices about the way she has lived and spent money. She originally had a significant lump sum from the divorce settlement, and also has taken out a mortgage on her property. In the past she has been made to pay costs to the father because of the way she has conducted proceedings, not only in financial matters but also in the Children Act proceedings.
21. Mr Webster states that the mother's solicitors have known from the beginning that payment of their fees might need to come from the mother's property as she does not

have any other significant assets in this country. They have not said in terms they will not act for the mother if a legal services order is not made.

22. Mr Webster also points to the sums that are being sought in this application. In the financial application the sums being sought for costs are enormous compared to the sums actually being sought. The sums for the Children Act proceedings are very large as well, so that the sum in total claimed is very high – over £400,000.
23. Finally Mr. Webster cautioned me against making an order with respect to the Children Act proceedings, saying that should be a matter for the judge actually dealing with them, who would be in a much better position to make a decision in the full knowledge of the case.
24. Mr. Webster properly does not argue that this is a case where the father could not meet the cost of such an order given his financial position.
25. I have read all the documents provided for me in both the bundle for the financial proceedings and for the children proceedings. I have read the written submissions from counsel and the emails sent following circulation of the draft judgment. I have also read the statement filed by the father in support of his application for permission to be able to take A to Country X for holidays.

Decision

26. In order to succeed in this application, the mother must demonstrate that without the payment she would not reasonably be able to obtain appropriate legal services for the proceedings or part of them. She must demonstrate that she is not able to secure a loan, or payment by way of charging any assets.
27. Apart from some £50,000 in a bank account, the only significant asset that she has is the property she owns. I am satisfied that she is not able to get any sort of litigation or other loan, nor funding by means of a Sears Tooth agreement. An important consideration is whether I should treat her property as her home in the way envisaged by Mostyn J in *Rubin* when he said that he would not expect a party to sell or charge her home or deplete a modest sum of savings.
28. This case is unusual in that the home in which the mother and A live is owned entirely by the father. Indeed the original order provides that ‘in no circumstances shall the respondent acquire proprietary rights of any nature’ in it. The mother may live in it for as long as it is needed as a home for A, or the father requires it to be sold for financial reasons (which can only happen with the mother’s agreement or by court order), or the parties jointly agree that an alternative property would be more appropriate for A.
29. I am satisfied that the mother’s accommodation in her current home lacks security, certainly in the long term and possibly in the medium term. In the recent Children Act proceedings the father has sought an interim change of residence, albeit those orders were not granted. It may be that further applications are made in the future; certainly the proceedings are ongoing. It is not difficult to envisage how that might lead to an application that she should leave the home she is living in.

30. The mother does have a significant income by way of maintenance for the benefit of A, out of which she does not have to pay any mortgage or rent (although she does pay for a mortgage on her own property). This is capable of allowing her to fund some costs of litigation which relate to him but nothing like the extent of those which have accumulated (and will continue to accumulate) here.
31. I do accept, therefore, that the mother cannot reasonably obtain legal services going forward without having to sell the house she owns. I accept that it could be possible for her to sell it, pay her legal costs and buy somewhere cheaper but this is speculative at the moment, and it would take some time. I do not know how much money would be raised, where the mother might be expected to live (given A attends a specialist school in the area) and what would be appropriate for her, and A if he spends time with her. This family have lived in the area for a significant period of time.
32. I accept that the mother's solicitors will have been aware when taking over the case that the mother did not have immediate funds to hand to pay large sums in costs, but the recent Children Act applications are unlikely to have been foreseen and have been expensive.
33. I have decided that I should determine the application both with respect to the financial and children proceedings. Both applications were listed before me today. The costs of even an application like this are very significant, and they also take court time. There is no guarantee that the judge dealing with an application in the CA proceedings will be the same one that is listed to hear the case although of course that would be best for all concerned. I have also had the bundle in the case and have read the documents in it, enabling me to be aware of the issues. The case is clearly complex with serious issues to be determined for a child who is in need of a high level of care. Even the issue of holiday contact is not straightforward because it involves an application to go to Country X, albeit by a father who has very significant ties with this country and has financial assets here.
34. In my original draft judgment I stated that I did not believe that the mother's current solicitors were likely to 'down tools' in the event that an order was not made with respect to costs that have been incurred in the past. This was based on a misunderstanding by me. Following the circulation of my draft judgment the mother's solicitors drew to my attention a letter from them which was included in the bundle and in which it was stated '*much as I would like to continue representing [the mother] the reality is that my partners will not allow me to continue to act and incurring costs without my firm's outstanding costs being discharged as a matter of urgency and my firm being placed in funds on account of the estimated future costs*'.
35. Following receipt of the email from the mother's solicitors, I received an email from Mr. Webster setting out his points in response.
36. Given the contents of the letter I therefore accept that the mother's solicitors will not continue to act unless they are put in funds with respect to the costs they have already incurred, or at least a significant proportion of them, as well as provision for future costs. This inevitably makes a considerable difference to the sums that I had originally alighted upon.

37. There is no doubt that the sums sought by the mother for the litigation are very high. So far as the financial proceedings are concerned, they were started in the knowledge that funds would not be available for some time, and in any event the costs of such an application (even where variation was being sought) should not have been very high. Some of the costs were incurred because the mother herself had been disorganised in the way that she had managed her affairs so that there were a lot of invoices to collate and provide to the father.
38. On the other hand, it has taken a long time for the father to engage in efforts to settle the case, which has meant it has become longer and more drawn out. Taking into account all the material I have before me I consider I should make an allowance of £30,000 towards past costs in the money claim. The mother does have some limited resources to add to this.
39. I therefore turn to the funding that is being sought for future costs. Just over £85,000 is being claimed, for what I remind myself is a 1 day hearing. I consider that £85,000 is too high. Most of the preparation has been done, and it is a case which will be heard on submissions alone. Given the father's open offer, if the case does not settle in advance, the issues at the hearing will be relatively narrow. Whilst I find that the mother will not reasonably be able to obtain legal services up to and including the next hearing without an order, I do not consider that the sum that would be required is anything like the sum claimed. I will therefore make an order for the payment of £30,000 which really should be sufficient. I hope that the parties will now negotiate terms to avoid the need for the hearing (the costs of which are likely to be disproportionate to the sums sought and would be much better spent on the family).
40. The total order that I make with respect to the money proceedings is therefore £60,000.
41. I then turn to the Children Act proceedings. The costs to date from Ms Kelsey's note are £95,338. The solicitors have said that they will not continue to act if they are not paid their costs to date. These are particularly sensitive and complex proceedings and it is extremely important for the mother to have the benefit of appropriate legal services going forward.
42. The costs to date from the solicitors are high but I have noted that there have been some recent, and urgent hearings. Given that it is not suggested that the father does not have the means to fund them at this stage, and on the basis of what the solicitors have said about being able to continue acting for the mother I am going to make provision for the payment of past costs in the sum of £75,000. I have not made provision for the full amount because some of the figures are high and the mother can make some payment for them from her own resources.
43. So far as future costs are concerned I will provide for the sum of £65,000. I consider that without payment of these sums for past and future costs the mother cannot reasonably secure appropriate legal services from now on up to and including the DRA.
44. The total sum for the children proceedings is therefore £140,000. The sums for costs to date and the first instalment for future costs should be paid within 14 days. The next instalment should be paid by the end of April and the third by the end of May.

45. Despite the complexities in the case, I express the hope that the parties will be able to come to an agreement about the way forward without the matter needing to go to a full hearing. The mother is undergoing some tests which may bring some clarity so far as the issues the father has raised are concerned. A is a child who has been seen regularly by professionals and teachers (and that continues to be the case). It may be that terms can be agreed as to holidays, if it is possible for the father to provide sufficient reassurance that he would not retain A in Country X if permitted to take him on holiday. In making these comments I make it clear that the proceedings are at an early stage and not all of the evidence is yet available. I only make the obvious comment that the costs of proceedings in both financial and emotional terms is very high.
46. In the event that the proceedings do not settle at the DRA then it will be open to the applicant to apply for further funding. At that stage the application should be made to the judge dealing with the case at the Central Family Court.
47. It will, of course, be a matter for the judges presiding over the respective hearings to decide whether to make any order for costs, adjustments or repayment of the sums that are the subject of this order at a later stage.
48. I am asked to make an order with respect to this application itself, for which the sum of £25,320 is claimed. It is right that the father did not make any offer to settle this application, making the hearing necessary. Although I have not made an order in the sums sought by the mother, the total sums for which I have made an allowance amounts to £200,000. I have determined that I should make a costs order. Having looked at the schedule sought, I do not consider the sums of money to be unreasonable given the level of representation of both of these parties. I have, however, made an order which is well short of the amount the mother sought. In all the circumstances I will make a costs order against the father in the sum of £15,000. I consider that the amounts sought were excessive but there was time between this application being issued and the hearing, and efforts should have been made to compromise. The father's stance remained at all times that the application should be dismissed.
49. I wish to thank counsel for their excellent presentation of this case and their very helpful and well-judged submissions.