



Neutral Citation Number: [2021] EWHC 303 (Fam)

Case No: FD19P00246, FD19P00380, FD19F05020
FD19F00064

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

Date: Wednesday, 13th January 2021

Before:

THE PRESIDENT OF THE FAMILY DIVISION
(Remotely via MS Teams)

Between:

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MR. NICHOLAS CUSWORTH QC, MS. SHARON SEGAL, MR. NICHOLAS WILKINSON and MR. DANIEL BURGESS (instructed by Payne Hicks Beach) appeared for the Mother.

LORD PANNICK QC, MR. NIGEL DYER QC, MR. DANIEL ALEXANDER QC, MS. DEBORAH EATON QC, MR. BRIAN GREEN QC, MR. STEPHEN JARMAIN, MR. DANIEL BENTHAM and MR. GODWIN BUSUTTIL (instructed by Harbottle & Lewis LLP) appeared for the Father.

MR. TOM WILSON (instructed by CAFCASS Legal) appeared for the Children.

Approved Judgment
In Private

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SIR ANDREW MCFARLANE P :

1. This is an application for additional payment under the legal services order that has hitherto been made in these proceedings which relate to two young children. The principle of there being a legal services order made by the court was established as long ago as June 2020 and subsequent orders have been made by the court since then.
2. The particular element of fees which are the subject of this application relate to an appeal which is listed to be heard in the Court of Appeal later this month for two days, in relation to a ruling that the court made now some months ago on the question of whether the court has jurisdiction to investigate the acts of the state of the UAE and/or Dubai, which potentially may be issues of fact at large in a fact-finding process which is yet to be undertaken. The court decided at first instance that the court did have jurisdiction and the father has permission to appeal that issue to the Court of Appeal and that is the appeal that is to be heard.
3. The position of the parties is that the mother seeks an additional payment under the legal services order of £643,000 to cover her fees for the pending appeal. The quantum of that sum is not in issue. The question of whether it should be paid upfront, as it were, under the legal services order is. The position of the father is that the appeal process should be looked at separately from the ordinary run of interlocutory and final hearings that are taking place at first instance. He submits that there should be no distinction between these parties and any other parties before the Court of Appeal Civil Division, where costs normally follow the event, and an impecunious respondent to an appeal is entitled to apply for security for costs. The father is offering the precise sum claimed, £643,000, as security for costs, to be held by his solicitors, to be used to pay costs to the mother if she is successful in responding to the appeal and a costs order is then made in her favour.
4. In that way, Mr. Nigel Dyer QC, for the father, says that the mother's position is entirely protected inasmuch as it would be were she to be any other litigant before the appeal process. If she is unsuccessful and the father succeeds on appeal, the mother would be unlikely to get a costs order in her favour but, submits Mr. Dyer, she is a person of substantial wealth and has more than easy access to funds of even this size to pay her lawyers. He therefore submits that, as a matter of principle, the approach should be to follow the ordinary course that would be followed in a civil appeal and deal with the matter as security for costs. In supporting that position, Mr Dyer argues that the common law jurisdiction for the provision of legal services that has developed to fund impecunious parents/former partners is limited to the interlocutory stages and final hearing of the proceedings at first instance, and does not extend to cover any appeal. Provision for costs on appeal, including security for costs for an impecunious respondent, exists and justifies any appeal process being given different consideration to that at first instance.
5. Mr. Nicholas Cusworth QC, for the mother, makes submissions in support of her application. He does so by referring to the now well-established case law, starting with *Currey v Currey (No 2)* [2006] EWCA Civ 1338; [2007] 1 FLR 946 , which has developed into the jurisdiction in the Family Court for providing litigation funding for a deserving party in proceedings and funding it by way of a periodical payments order paid in advance. The jurisdiction mirrors that which is in statutory form in the Matrimonial Causes Act 1973, section 22ZA, which provides for orders for payment

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with respect to legal services in matrimonial proceedings, but, as a common law development, it is of course not tied by that statutory provision because the payments are not, as in this case, limited to matrimonial proceedings.

6. Mr. Cusworth accepts, and Mr. Dyer clearly rightly firmly argues, that for the court to make an order for legal services funding that covers the costs of an appeal may be breaking new ground, certainly insofar as any reported cases are concerned. There is simply an absence of authority one way or the other on whether appeals are to be included or, for some reason, excluded from the legal services funding jurisdiction. Mr. Dyer says that that must be for good reason, namely that there is a sound, fair and proper costs regime in the Court of Appeal, represented by the security for costs mechanism, and that there is simply no need for impecunious litigants to look to legal services funding orders to cover appeals.
7. Mr. Cusworth did not accept that submission and, by illustration, he pointed to a limited number of authorities that show that the court has been prepared to make legal services funding payment orders with respect to proceedings other than first instance trials and other first instance proceedings in this jurisdiction, for example, funding proceedings abroad or for arbitration. Mr Cusworth referred in particular to:

- i) In *Currey* itself, Wilson LJ (at paragraph 32) endorsed the approach that awards for legal services were separate from any consideration of costs:

‘Nevertheless it may be helpful to state that I entirely agree with Mr Mostyn in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, FD, at para [127] that a costs allowance within a maintenance order is not an order for costs and so would not fall foul of the new general rule [‘no order for costs’]; and perhaps helpful also to observe that, insofar as the objection in principle to a costs allowance has previously been cast in part upon an argument that it pre-empts the normal despatch of issues as to costs at the conclusion of the proceedings, such an argument will largely fall away by virtue of the new rules. The proper treatment of liabilities for costs thereunder will generally be that they are debts to which the judge should have regard in making his substantive award; and so in my view an allowance for costs within an award of maintenance in the circumstances which I have sought to outline would be consonant with the movement under the new rules to cater for costs at an earlier stage than hitherto.’;

- ii) In *Rubin v Rubin* [2014] EWHC 611 (Fam); [2014] 2 FLR 1018, Mostyn J described the purpose of the jurisdiction at paragraph 13(iv):

‘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. Therefore, the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs in CPR Part 44. It is not a surrogate inter partes costs jurisdiction.’

And again at paragraph 13(x), where a wide spectrum of potential dispute resolution procedures is said to be included:

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‘The court should make clear in its ruling or judgment which of the legal services mentioned in s 22ZA(10) the payment is for; it is not however necessary to spell this out in the order. A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.’;

- iii) In *G v G (Child Maintenance: Interim Costs Provision)* [2009] EWHC 2080 (Fam); [2010] 2 FLR 1264, Moylan J held that there was no distinction to be drawn as between an order for legal services provision made with respect to proceedings relating to a child in England and Wales and those in a foreign jurisdiction (paragraph 47);
- iv) In *M-T v T* [2006] EWHC (2496); [2007] 1 FLR 925 (at paragraph 22), Charles J emphasised that one purpose justifying deployment of the court’s jurisdiction to make provision for legal funding was to establish or maintain equality of arms:

‘To my mind it certainly can be for the benefit of the children in cases under [CA 1989] Sch 1 to ensure that they are properly represented and have an appropriate equality of arms to the respondent to those proceedings. Therefore, if Bennett J was deciding that the court did not have such jurisdiction in *W v J (Child: Variation of Financial Provision)* [2003] EWHC 2457 (Fam), [2004] 2 FLR 300 for the reasons I have given, I respectfully do not agree and I do not propose to follow that decision. I find that I do have such jurisdiction.’.

- 8. For my part, I can see no distinction which would justify limiting the court's jurisdiction so as to exclude funding of an appeal process. Each case will turn on its own facts and whether an award is actually made to cover an appeal will need to be looked at on a case-by-case basis. However, as a matter of principle, I can see no reason for making the distinction. With respect, I consider that the father's submissions confuse two separate matters. The first is funding of legal services for an impecunious litigant; that is the target of the legal services order jurisdiction that has been developed by the court. The second is the costs regime and it is that to which Mr. Dyer refers. This is not a costs application that is being made by the mother. It is payment for legal services and for funds by which she can pay her lawyers so that she can take part in the legal process. Therefore, as I see it, it is either irrelevant, or certainly not determinative, that the Court of Appeal has a security for costs mechanism available to it and that the father is willing to co-operate in making a secured costs payment into his solicitors' account. That is, of course, a welcome gesture, but it nevertheless leaves the mother open to the outcome of an appeal process whereby either she does not succeed in opposing the appeal or, for some other reason, the Court of Appeal does not make an order for costs in her favour at the conclusion of the appeal.
- 9. In the generality of these proceedings, the court has already determined that irrespective of the assets that she undoubtedly has at her disposal, the father should be funding her legal fees on an ongoing basis during the currency of the proceedings. As

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Mr. Cusworth points out, this is neither a blank cheque nor a one-way transmission of funds. At each stage, accounts will be taken and it remains open to the court, at the final hearing of the financial dispute between this couple, to readjust what has been paid upfront in terms of legal fees with the benefit of hindsight as to what has happened both as to the outcome of the proceedings, the litigation conduct within the proceedings, the fees that have been charged and other matters. The purpose of these orders is to keep the boat afloat, as it were, and the show on the road during the currency of the proceedings.

10. The only point that the father can refer to, as he does properly and clearly in Mr. Dyer's submissions, is the availability of funds to the mother by which she can pay her solicitors herself for the appeal now without having to turn to the father for this particular payment. However, as I have indicated, the court has already determined that the mother should not be looking to draw on her own funds at this stage with respect to these matters. I cannot see that the appeal process should be dealt with and approached entirely differently from all of the other hearings in this case.
11. A further, final matter that weighs in my mind in this case -- it is not a major factor but it is there as part of the balancing exercise and in so far as it is there, it goes in the mother's favour -- is that the particular point upon which the appeal is being taken arises from the father's status. It is not an ordinary point in the dispute between them as parents of these two children. It is a particular characteristic that almost uniquely, in the experience of this court, arises because of the father's status in his country and the connection he has with his state. That seems to me all the more reason why the mother should not be at any disadvantage in the appeal process. The father is entitled to, and the Court of Appeal has given him permission to, appeal the point. It is a point which is of importance, but it relates to his status and his role. It is important that the mother is able to contest the appeal, as she did at first instance, and it therefore seems to me that for that reason in addition, she is entitled to legal services funding for that from the father so that she can take a full part in the appeal process.
12. So, for those reasons, I therefore accede to the application and I make the additional legal services funding order of £643,000 which is sought.

(Please see main transcript for continuation of proceedings)