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Maintenance Pending Suit

Statutory Framework

Section 22(1) Matrimonial Causes Act 1973
On an application for a divorce, nullity of marriage or judicial separation order, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the making of the application and ending with the date of the determination of the suit, as the court thinks reasonable.

Paragraph 38 Schedule 5 Civil Partnership Act 2004
On an application for a dissolution, nullity or separation order, the court may make an order requiring either civil partner to make to the other for the other's maintenance such periodical payments for such term—

a. beginning no earlier than the date on which the application was made, and
b. ending with the date on which the proceedings are determined, as the court thinks reasonable.

When can the Order be made?

An Order for MPS can only be made following the making of a divorce petition. The Court cannot make an order for MPS after there has been a final divorce order. Where a final order is made and proceedings are ongoing, the Court can make an order for interim periodical payments (FPR 9.7 and 9.8).

Applicable Principles:

Nicholas Mostyn QC (as he was then) distilled the following principles which are applicable to an application for MPS in *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family [2005] EWHC 2860 (Fam)*:

"123. The leading cases as to the principles to be applied on an application for maintenance pending suit are F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45 , G v G (Maintenance Pending Suit: Legal Costs) [2002]3 FCR 339 , and M v M (Maintenance Pending Suit) [2002] 2 FLR 123 .

124. From these cases I derive the following principles:

i) The sole criterion to be applied in determining the application is "reasonableness" (s22 Matrimonial Causes Act 1973), which, to my mind, is synonymous with "fairness".

ii) A very important factor in determining fairness is the marital standard of living (F v F). This is not to say that the exercise is merely to replicate that standard (M v M).

iii) In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long term expenditure more aptly to be considered on a final hearing (F v F). That budget should be examined critically in every case to exclude forensic exaggeration (F v F).

iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources (G v G , M v M). In such a situation the court should err in favour of the payee.

v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in

assuming that the third party will continue to supply the bounty, at least until final trial (M v M).

Immediate Needs:

An order for MPS will be made to meet the immediate income needs of a spouse. In *Rattan v Kuwad [2021] EWCA Civ 1*, the Court of Appeal considered the issue of immediate needs. As per Moylan J:

49. I also do not consider that the judge was right to exclude certain items from the wife's budget as not being "immediate expenditure needs". The word "immediate", in this context, does no more than reflect the fact that the court is concerned with an order for maintenance pending the final resolution of the financial dispute between the parties. However, the use of this word does not mean that the court should embark on the type of exercise undertaken by the Judge in this case. The fact that some items of expenditure are not incurred every month does not mean they should be excluded for the purposes of determining what maintenance is reasonable.

Mr Justice Peel in *HAT v LAT [2023] EWFC 162* at [19] rejected the submission made on behalf of the Husband that the Wife should be "confined to emergency, immediate relief; that is not consistent with the overarching approach of reasonableness which the authorities should endorse"

The Budget:

The Court of Appeal in *Rattan v Kuwad [2021] EWCA Civ 1* also considered the issue of "critical analysis" and whether a separate budget is required on an application for MPS. In short, each case will depend upon its own set of circumstances. As per Moylan J:

49….The court is not required to undertake any greater "critical" analysis of a schedule of income needs than is required of any other aspect of the case. The court is required to undertake such analysis as is sufficient to be satisfied that the ultimate award is "reasonable". In some cases this might require a detailed examination of a budget, in others,

such as the present case, it will be immediately apparent whether the listed items represent a fair guide to the applicant's income needs.

50. The Form E requires income needs to be set out on an annual, monthly or weekly basis. They will necessarily be averaged over the relevant period. Further, given that maintenance is typically ordered to be paid monthly, it is inevitable that this will require expenditure to be averaged. This does not mean that any of those needs are to be excluded for the purposes of maintenance pending suit. As the wife pointed out in her submissions, she could not return to court when the relevant expenditure actually arose. There may be exceptional items of expenditure which need to be considered but, with all due respect, the approach taken by the Judge in this case was unrealistic and would require far too detailed an analysis. It would also be inconsistent with the broad analysis undertaken for the purposes of determining an application for maintenance pending suit.

51. This case also demonstrates that it is not necessary for an applicant for maintenance pending suit to provide a list of income needs distinct from that set out in the Form E. As the wife submitted, she was seeking no more than her basic needs which she had set out in her Form E and which could also be used for the purposes of her maintenance pending suit application.

The Court's Approach:

See the following:

- *Moore v Moore [2009] EWCA Civ 1427*, per Coleridge J at [22]
  "It is designed to deal with short- term cash flow problems which arise during divorce proceedings. Its calculation is sometimes somewhat rough and ready, as financial information is frequently in short supply at the early stage of the proceedings. It is nonetheless valid until discharged".
- Although see *Collardeau-Fuchs v Fuchs [2022] EWFC 6*, *[2022] 2 FLR 957*, per Mostyn J at [46]
  "the court should try to paint its decision with a fine sable rather than a broad brush, where it has the ability to do so. Of course, in most cases, the court will not have

either the time or the material to conduct an exhaustive investigation and so the exercise will perforce be rough and ready".

Making an application:

The relevant procedural rules for making an application are contained in FPR 9.7 and 18. A D11 application and draft order will need to be filed in accordance with the procedure outlined in Part 18. A statement in support of the application will be required in the absence of a Form E which sets out a budget. The statement must set out why the order is necessary and give up to date information about that party's financial circumstances (FPR 9.7(3)).

Practitioners Considerations:

Always bear in mind the proportionality of an application balanced against the assets involved. Moylan J in *BD v FD* [2014] EWHC 4443 reaffirmed his remarks in *G v G* that *"interim hearings are an expensive exercise, and, in my view, they should be pursued only when, on a broad assessment, the court's intervention is manifestly required"* and confirmed that the same is equally applicable to applications for MPS.

The budget should focus on items which are immediate income needs. The Court of Appeal confirmed in *Rattan v Kuwad* that there is "no reason in principle" why school fees cannot form part of the budget.

Applications for MPS are exempt from the general no order as to costs. The 'clean sheet' approach is applicable. Parties are able to make offers that are without prejudice save as to costs.

Legal Services Payment Orders

Statutory Framework:

Orders for payment in respect of legal services following an application for divorce fall under s.22ZA and s.22ZB of Matrimonial Causes Act 1973.

The statutory regime reflected the approach taken in previous authorities such as *A v A (Maintenance Pending Suit: Provisions for Legal Fees)* [2001] 1 FLR 377 and *Currey v Currey (No 2)* [2006] EWCA Civ 1338. The Court can make provision for legal services funding in other proceedings such as Schedule 1. Whilst the statutory framework outlined above doesn't apply, the common law jurisdiction enables the Court to make a legal costs funding order (see ***BC v DE*** [2016] EWHC 1806 (Fam), [2017] 1 FLR 1521).

Guiding principles:

Mostyn J in *Rubin v Rubin [2014] EWHC 611 (Fam)* outlined the following principles which are applicable on any application for a LSPO:

(i) When considering the overall merits of the application for a LSPO, the court is required to have regard to all the matters mentioned in s 22ZB(1)–(3).

(ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in TL v ML (Ancillary Relief: Claim Against Assets of Extended Family) [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, *at para [124](iv) and (v), where it was stated:*

> *'(iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources. In such a situation the court should err in favour of the payee.*
>
> *(v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified*

in assuming that the third party will continue to supply the bounty, at least until final trial.'

(iii) Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.

(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. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings.

(v) In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact-specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it.

(vi) Evidence of refusals by two commercial lenders of repute will normally dispose of any issue under s 22ZA(4)(a) whether a litigation loan is or is not available.

(vii) In determining under s 22ZA(4)(b) whether a Sears Tooth arrangement can be entered into, a statement of refusal by the applicant's solicitors should normally answer the question.

(viii) If a litigation loan is offered at a very high rate of interest it would be unlikely to be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest, if the court later considered it just so to order.

(ix) The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the

opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. If such an undertaking is refused the court will want to think twice before making the order.

(x) 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.

(xi) Generally speaking, the court should not fund the applicant beyond the family dispute resolution (FDR), but the court should readily grant a hearing date for further funding to be fixed shortly after the FDR. This is a better course than ordering a sum for the whole proceedings of which part is deferred under s 22ZA(7). 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 the issues to be tried are more clearly defined.

(xii) When ordering costs funding for a specified period, monthly instalments are to be preferred to a single lump sum payment. It is true that a single payment avoids anxiety on the part of the applicant as to whether the monthly sums will actually be paid as well as the annoyance inflicted on the respondent in having to make monthly payments. However, monthly payments more accurately reflects what would happen if the applicant were paying her lawyers from her own resources, and very likely will mirror the position of the respondent. If both sets of lawyers are having their fees met monthly this puts them on an equal footing both in the conduct of the case and in any dialogue about settlement. Further, monthly payments are more readily susceptible to variation under s 22ZA(8) of the MCA 1973 should circumstances change.

(xiii) If the application for a LSPO seeks an award including the costs of that very application, the court should bear in mind s 22ZA(9), whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if a LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite

save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.

(xiv) A LSPO is designated as an interim order and is to be made under the Part 18 procedure (see r 9.7(1)(da) and (2) of the Family Procedure Rules 2010 (FPR 2010)). 14 days' notice must be given (see FPR 2010, r 18.8(b)(i) and PD 9A, para 12.1). The application must be supported by written evidence (see FPR 2010, r 18.8(2) and PD 9A para 12.2). That evidence must not only address the matters in s 22ZB(1)–(3) but must include a detailed estimate of the costs both incurred and to be incurred. If the application seeks a hearing sooner than 14 days from the date of issue of the application pursuant to FPR 2010, r 18.8(4), then the written evidence in support must explain why it is fair and just that the time should be abridged.

Historic Costs?

The Court considered the payment of historic costs in *BC v DE.* Cobb J distinguished this case from the facts in *Rubin* on the basis that the Court in *Rubin* was not considering funding in ongoing proceedings. The proceedings had concluded. Therefore, Cobb J concluded that Mostyn J was correct in *Rubin* to reject an application to recoup costs in concluded claims. As per Cobb J:

22. My concern is to ensure that the mother and father have equality of arms, and equal access to justice in this case. I do not, as Mr. Turner sought to persuade me, treat equality of arms as "equality of payments" – a suggestion that, £ for £, the father should ensure that the mother is more or less equally provided for in relation to her costs as he is. However, for as long as any client has incurred significant outstanding legal costs with his or her solicitor, there is no doubt but that they become bound ("beholden" per Mr. Harker, see [9] above) to each other by the debt; this may well impact on the freedom of, and relative strengths within, their professional relationship. Further, the solicitor may feel constrained in taking what may be important steps in relation, for instance, to discovery, or in relation to exploring parallel non-court dispute resolution. The debt may materially influence the client's stance on possible settlement, and the solicitor's advice in relation to the same: a client – without independent resources – is in a vulnerable position, and may be more inclined to accept a

settlement that is less than fair simply because of the concerns about litigation debt. This would not be in the interests of this, or any, child in Schedule 1 proceedings. A level playing field may not be achieved where, on the one side, the solicitor and client are 'beholden' to each other by significant debt, whereas on the other there is an abundance of litigation funding. Though there is an increasingly familiar and commendable practice of lawyers acting pro bono in cases before the family courts, particularly where public funding provision previously available has been withdrawn, legal service providers, including solicitors and barristers, are not charities, nor are they credit-agents. It is neither fair nor reasonable to expect solicitors and the bar to offer unsecured interest-free credit in order to undertake their work; there is indeed a solid reason for lawyers not to have a financial interest in the outcome of family law litigation.

26. I would just make this further point. I would not regard it as necessary for an applicant to demonstrate that his or her solicitor has actually 'downed tools' or will do so before he or she could legitimately make an application for a legal costs funding order where 'historic' costs have been incurred. Such an approach could be problematic. I agree with the essence of Mostyn J's approach – namely that a clear case would need to be shown that the solicitors are reaching the end of their tolerance – but the approach described in [16] of Rubin ought not to be applied too strictly, otherwise it would work materially to the disadvantage of the honourable solicitor who is prepared to soldier on (perhaps somewhat against their better commercial judgment) for the good of the client or the case.

From a practical point, it is strongly advised that sworn evidence is adduced to support the assertion that a legal representative will cease to work if historic costs are not paid notwithstanding the grant of an LSPO (*DH v RH [2023] EWFC 111,* MacDonald J at paragraph 59).

Costs

As with an application for MPS, the costs of an LSPO application are exempt from the general rule that there shall be no order as to costs.