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Rubin v Rubin [2014]

[2014] EWHC 611 (Fam)

10/03/2014

Barristers
Christopher Hames KC

Court
High Court (Family Division)

Practice Areas
Financial Remedies
International Children Law

Summary
The court gave guidance on the general principles to be considered in applications for legal services payment orders under the Matrimonial Causes Act 1973 s.22ZA.

Facts
The applicant wife (W) applied for a legal services payment order (LSPO) to cover costs incurred in financial remedy proceedings. She also applied for a lump sum to cover costs in proceedings under the Hague Convention on the Civil Aspects of International Child Abduction 1980.

W was English and the respondent husband (H) was American. They had two young children and had moved to the United States. After a visit to England, W issued divorce proceedings in London and sought financial remedies. She refused to allow the children to return to the US. In Hague Convention proceedings issued by H, she was found to have unlawfully retained the children in England and Wales and was ordered to return them to the US. H issued divorce proceedings in the US, to which W responded. H obtained a stay of W's English divorce proceedings.

Held
(1) The Legal Aid, Sentencing and Punishment of Offenders Act 2012 had put the powers of the court to award a costs allowance on a statutory footing in relation to divorce proceedings by inserting s.22ZA and s.22ZB into the Matrimonial Causes Act 1973. The applicable principles, both substantive and procedural, were as follows: (a) when considering the overall merits of the application for an LSPO the court was required to have regard to all the matters mentioned in s.22ZB; (b) 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 F.L.R. 1263, TL applied; (c) where the claim for substantive relief appeared doubtful, the court should judge the application with caution; (d) the court could not make an order unless it was satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, the exercise

essentially looked to the future. An LSPO should only be awarded to cover historic unpaid costs where the court was satisfied that without such a payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings; (e) in determining whether the applicant could 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. However, if the home was of such a value that it was likely to be sold at the conclusion of the proceedings then it might be reasonable to expect the applicant to charge her interest in it; (f) evidence of refusals by two commercial lenders of repute would normally dispose of any issue under s22ZA(4)(a) as to whether a litigation loan was available; (g) in determining under s22ZA(4)(b) whether a Sears Tooth arrangement could be entered into, a statement of refusal by the applicant's solicitors would normally answer the question; (h) if a litigation loan was offered at a very high rate of interest it would not usually be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest; (i) the order should normally contain an undertaking by the applicant to repay to the respondent such part of the amount ordered if the court was of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so; (j) the court should make clear in its ruling or judgment which legal services the payment was for. It could include mediation or dispute resolution before any financial remedy proceedings had been commenced; (k) the court should not fund the applicant beyond the financial dispute resolution appointment (FDR), but the court should grant a date for further funding to be fixed shortly after the FDR when it would be better placed to assess accurately the true costs of taking the matter to trial; (l) when ordering costs funding for a specified period, monthly instalments were to be preferred to a single lump sum payment; (m) an LSPO was an interim order to be made under the Part 18 procedure on 14 days' notice. The application was to be supported by written evidence and include a detailed estimate of the costs both incurred and to be incurred (see para.13 of judgment). (2) In her applications W sought to recover costs which had already been incurred; there was to be no further substantive litigation about the children or about money. She therefore fell foul of principle (d) above. Her lawyers had not said that they would not act unless they were paid outstanding costs and funded for the future. If her application was granted it would represent a very dangerous subversion of the exclusivity of the inter partes costs powers in CPR Pt 44, causing a shadow or surrogate jurisdiction to emerge. That could not be allowed. Financial remedy proceedings were ongoing in California. It was there that the question of W's debts to her lawyers should be adjudicated (paras 16-18). (3) In any event, an LSPO was an interim order dependent for its existence and validity upon the continuation of the main suit. Since W's divorce proceedings were stayed, all subsidiary applications for interim relief, whether for maintenance pending suit or an LSPO, were also stayed. However, W's LSPO application was meritless and should therefore be dismissed (paras 24-25).