

## Articles

# The costs allowance ‘revolution’ in proceedings for financial relief

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Buried deep in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) are provisions that change the way we will approach costs allowances as inherent components of ‘maintenance’ pending suit. LASPO introduces an explicit statutory regime governing a payment by one party to enable another to fund legal advice and representation in matrimonial and civil partnership proceedings. The relevant ss 49–54 sandwiched in Part 2 of LASPO are due to come into force in April 2013. This article considers the current law applicable to a claim for a costs allowance as part of a maintenance pending suit application and highlight the significant changes introduced by LASPO.

For reasons of brevity and clarity only, this article does not repeat all the different sections for married partners on the one hand and civil partners on the other. Nor does it refer to both alternatives throughout but only on occasion to remind the reader that the changes to the law apply to both regimes.

### The current state of the law

#### *The rationale*

At present, the costs allowance, as a component of a claim for maintenance pending suit, is a concept that has evolved through case-law: it is an extrapolation of the concept of ‘maintenance’ pending suit provided for in s 22 of the Matrimonial Causes Act 1973 (MCA 1973). The costs allowance developed as an alternative to self-funding (by whatever means available) to serve the ‘unserved constituency’ of those who had insufficient funds or borrowing capacity to pay for advice and representation or could not secure public funding (*Currey v Currey (No 2)* [2006]

EWCA Civ 1338, [2007] 1 FLR 946, at para [21] per Wilson LJ). Costs allowances can also be seen in the context of the court’s overriding objective to deal with cases justly and, as a priority in that pursuit, to ensure that parties to a case are on an equal footing (Family Procedure Rules 2010 (FPR 2010), r 1.1(2)(c)).

#### *Legal basis*

*A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 FLR 377 was the first case to authoritatively rule that s 22 of the MCA 1973 is ‘wide enough to empower the court to include an element towards the payee’s costs of the suit provided it is reasonable to do so’ (p 383, per Holman J).

The leading case in matrimonial proceedings is *Currey v Currey* (above), a case in which the rich wife was pitched against the relatively impoverished husband in ongoing financial remedy proceedings. The wife had sought capitalisation of a periodical payments order made 3 years earlier against her in the husband’s favour. In the process of resolving the capitalisation claim, the district judge made an order increasing the original periodical payments order of £48,000 pa by £10,000 per month to fund the husband’s ongoing legal costs.

The wife argued that the husband had the means to fund his own litigation, which he had failed to apply. She also maintained that the husband’s litigation behaviour, which included ill-directed applications, poor financial disclosure and outstanding costs orders due to her, made any costs allowance wholly unsuitable in the circumstances. Wilson LJ set out the law and the tests that must be applied in any application for a costs allowance. Those tests can be divided into minimum

standards, which the applicant *must* satisfy in all cases, and discretionary factors, which *may* militate for or against an order for a costs allowance, depending on the particular circumstances of the case.

#### *Minimum standards*

The guiding standard is that the applicant must demonstrate an inability to reasonably procure legal advice and representation by any other means. The applicant must show, therefore, that she cannot reasonably: (1) deploy assets directly to fund legal services; (2) deploy assets indirectly to fund legal services (ie borrow); (3) enter into a *Sears Tooth* agreement; or (4) secure public funding (*Currey v Currey*, para [20]).

'Reasonableness' is a criterion that applies to all four alternative methods of self-funding; it acts as a brake on bald arguments that *any* interest in *any* asset provides the basis for self-funding, thereby disqualifying a party from seeking a costs allowance. For example, in *C v C (Maintenance Pending Suit: Legal Costs)* [2006] 2 FLR 1207, the court rejected the husband's argument that the wife should raise a mortgage on her £500,000 interest (half share) in the family home in order to pay her legal costs. The court concluded that such a course of action would be unfair. All other assets were held in the husband's sole name. The husband's case was that no other capital could be raised, despite his shareholding in a fast-developing company valued at £13m. In those circumstances, the court regarded the wife's re-mortgage of the family home as wholly unfair (ie unreasonable) in circumstances where no other capital provision was guaranteed and there was risk to her and the children's future occupation of the family home.

#### *Discretionary factors*

Satisfaction of the minimum standards outlined above opens the door to the judge's discretion, which remains the 'dominant safeguard against injustice' (*Moses-Taiga v Taiga* [2005] EWCA Civ 1013, [2006] 1 FLR 1074, per Thorpe LJ at para [25]). The discretionary factors are as varied as the facts of each case: arguments should focus on why, given satisfaction of

the minimum standards, it is [un]fair, [un]just or [un]reasonable to order a costs allowance.

In *Currey v Currey*, Wilson LJ considered that:

'[A]t this stage other factors may well come into play which will no doubt on occasions lead the court to decline to make [an order for a costs allowance] notwithstanding the demonstration. The subject-matter of the proceedings will surely always be relevant; and, insofar as it can safely be assessed at so early a juncture, the reasonableness of the applicant's stance in the proceedings will also be relevant. So also will a variety of other features, including of the type which exist in the present case, in particular the arresting fact that the husband already owes £46,000 to the wife in respect of costs.'

#### *Amount and duration*

There is no fixed rule as to the amount of a costs allowance. However, the court will be alive to the need to 'proceed with a judicious mixture of realism and caution' as to both the amount and duration of a costs allowance (*Currey v Currey*, para 28).

The need for a self-funded client to regularly pay legal costs acts as a brake on unnecessary or disproportionate litigation. Therefore, costs allowances are invariably time-limited to significant junctures in the life of the case in order to replicate the costs-considerations inherent in self-funded cases. The obvious and significant way-markers in a financial remedy case are the FDA, the FDR appointment and the final hearing (see also *TL v ML (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263, at para [130]).

### **The post-revolution order: costs allowances under LASPO**

#### *Fundamental changes*

LASPO changes the landscape significantly. Firstly, the terminology changes. 'Costs allowances' are extinct; their replacement are 'orders for payment in respect of legal services' (hereafter referred to as 'legal services orders'). Secondly, legal services orders are no longer elements of

'maintenance' pending suit. Section 22(2) of the MCA 1973 will make it explicit that an order for maintenance pending suit 'may not require a party to a marriage (or a civil partner) to pay to the other any amount in respect of legal services for the purposes of the proceedings'. Instead, and thirdly, LASPO creates a new and express statutory basis for legal services orders. The MCA 1973 and the Civil Partnership Act 2004 will have a number of new paragraphs inserted in order to define and guide the application of the court's discretion in deciding these new orders.

#### *Applicable proceedings*

Legal services orders are available both to proceedings for divorce, nullity of marriage or judicial separation (or dissolution, nullity or a separation order) and, separately, proceedings for financial relief. The statutory delineation does reflect the current law to a certain extent, which provides that costs allowances are available for proceedings in which the court's jurisdiction is challenged for whatever reason, as well as proceedings for financial

relief. However, legal services orders will be independently available in proceedings for financial relief, with or without decree absolute.

#### *Definitions*

Section 22ZA(10) of the MCA 1973, defines exactly what legal services can be paid for by an order:

- (a) providing advice as to how the law applies in the particular circumstances,
- (b) providing advice and assistance in relation to the proceedings,
- (c) providing other advice and assistance in relation to the settlement or other resolution of the dispute that is the subject of the proceedings, and
- (d) providing advice and assistance in relation to the enforcement of decisions in the proceedings or as part of the settlement or resolution of the dispute

and they include, in particular, advice and assistance in the form of representation and any form of dispute resolution, including mediation. Orders may cover legal services

specified in the court order (MCA 1973, s 22ZA(11)) or legal services for a specified period or part of the proceedings.

Legal services orders, therefore, can apply to enforcement proceedings as well as to any form of dispute resolution, including mediation. The specific definitions of different legal services and the identification of certain parts of the proceedings may also give greater latitude to the intended payer to argue that an order should be more limited (in amount and time) than may have been made under the current law.

#### *Payment and security*

Section 22 of the MCA 1973 envisages only periodical payments for the maintenance of the payee (nevertheless, drafted orders do sometimes provide for payment on a monthly basis or as one single composite amount at the payer's election, see for example *C v C (Maintenance Pending Suit: Legal Costs)* [2006] 2 FLR 1207).

Section 22ZA of the MCA 1973 refers, in contrast, to the payment of an 'amount' for the purpose of enabling the applicant to obtain legal services. Section 22ZA(6) of the MCA 1973 then provides that the amount may be paid, in whole or in part, by instalments of specified amounts. These provisions arguably provide greater flexibility for orders to reflect that litigation often has periods of drought and other periods where the costs increase significantly and exponentially. The power to make legal services orders is, in effect, a power to make interim lump sum orders (but for a specific purpose only).

Furthermore, s 22ZA(6)(b) of the MCA 1973 makes provision for the court to require that instalments – if that is how the order is to be paid – can be secured to the satisfaction of the court. Finally, s 24A(1) of the MCA 1973 is amended to provide that a legal services order is an order that entitles the court at the time of making that order or any time thereafter to make a further order for the sale of property.

#### *Minimum standards*

LASPO retains the distinction between minimum and discretionary standards inherent in the current case-law, albeit with modifications and extensions. The court must 'not make an order . . . 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' (MCA 1973, s 22ZA(3)). In particular, the court must be satisfied that the applicant is not *reasonably* able to secure a loan to pay for the legal services and that the applicant is unlikely to be able to obtain legal services by granting a charge over any assets recovered in the proceedings (MCA 1973, s 22ZA(4)(a) and (b)). The retention in the statute of the criterion of 'reasonableness' may mean that some case-law referred to above will continue to be of use in arguing whether a party can reasonably deploy assets directly or indirectly to self-fund the litigation.

The current law on costs allowances identifies that the production of correspondence between a party's solicitors and at least two banks will ordinarily be sufficient to satisfy the court that a loan is not available. Additionally, a simple statement from a party's solicitors stating that they are not prepared to enter into a *Sears Tooth* charge will ordinarily suffice (*TL v ML*, para [129]). Given the proliferation of companies providing litigation loans, it will be prudent to address the specific requirements of s 22ZA(4) of the MCA 1973 in any narrative statement and to provide as much documentary evidence as is proportionate to demonstrate that a litigation loan is unaffordable, inappropriate or unacceptable in the circumstances.

#### *Exercising the discretion*

In deciding how to exercise its power to make a legal services order, the court must have regard to a list of factors similar to those in s 25(2) of the MCA 1973, which include the well-known matters of income, earning capacity (and any reasonable increase to it), property, financial resources, needs, obligations and responsibilities of both the payer and payee. In addition, s 22ZB(1)(c–h) of the MCA 1973 codifies a number of additional factors common to the current case-law, which the court must weigh in the balance, as follows:

- (c) the subject matter of the proceedings, including the matters in issue in them;
- (d) whether the paying party is legally represented in the proceedings;

- (e) any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise;
- (f) the applicant's conduct in relation to the proceedings;
- (g) any amount owed by the applicant to the paying party in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were party; and
- (h) the effect of the order or variation on the paying party.

As can be seen, a party's conduct from the very start of proceedings (or indeed from other unrelated proceedings if a costs order were made) will be of significance to the court's discretionary exercise. In a case in which a legal services order may be necessary, particular attention will need to be paid to pre-issue conduct, the making and consideration of offers and the proportionate and streamlined progress of the case.

LASPO also introduces a statutory counter-balance to the position of the party applying for the legal services order. Section 22ZB(3) of the MCA 1973 requires the court to have regard, in particular, to whether making or varying an order is likely to cause undue hardship to the payer or prevent the payer from obtaining legal services him/herself.

#### *Variation and duration*

LASPO is silent as to legal services orders being time-limited as an incentive to achieve settlement. However, LASPO does make it clear that legal services orders may be made on more than one occasion (as order or orders) or for a specified period or for a specified part of the proceedings. It is

likely, therefore, that the practice of time-limiting orders to provide a reasonable inducement – as opposed to improper pressure – to settle will continue (*Currey v Currey*). The court is given the power 'at any time' to vary an order if 'it considers that there has been a material change of circumstances since the order was made' (MCA 1973, s 22ZA(8)).

#### **Costs**

In the reckoning for costs, s 22ZA(9) of the MCA 1973, provides that 'for the purposes of the assessment of costs in the proceedings, the applicant's costs are to be treated as reduced by any amount paid to the applicant pursuant to an order under this section for the purposes of those proceedings'. What remains unclear at the time of writing this article is whether a LASPO order for payment in respect of legal services will be classified as a 'financial remedy' in the meaning given to that term in FPR 2010, r 28(3)(4)(b), thereby engaging the provisions for costs in financial remedy proceedings.

#### **Conclusion**

So, not quite a 'revolution' as suggested in the title to this article. However, LASPO does provide an [arguably] welcome codification of the case-led law on the provision of costs allowances or, soon to be, orders for payment in respect of legal services. Given the complete erosion of public funding for financial remedy proceedings, the tightening of credit facilities and the understandable unwillingness of lawyers to rely on a future capital-recovery charge, applications for legal services orders may well prove popular.