



Money's Too Tight (to mention)... Has It Become Easier to Fund A Divorce?

Following recent legislation, spouses can now apply for a lump sum order to fund their legal costs before final settlement. **Ann Northover** and **Angus Hortop** investigate how this will affect both the parties and the role of specialist matrimonial lenders.

Whilst the Family Courts have always had extensive powers to order the distribution of property between spouses on final settlement, their interim powers to provide a party with a sum for costs have been limited to adding in extra sums to maintenance pending suit and interim periodical payments orders. Importantly, the Court did not have the power to order an interim lump sum for costs. This limit on its powers has left the less financially secure spouse in a quandary; can they get their claim off the ground in the first place, assuming they have then should they press on with their claim and suffer a considerable period of financial hardship or should they 'give in' and accept a significantly less advantageous settlement?

This can be a particular problem where the other spouse has concealed their assets through a complex mix of offshore trust and corporate structures. These cases usually take a considerable amount of time and money to get to final hearing due to issues with obtaining adequate financial disclosure. Mrs Justice King in *M v M* [2013] EWHC 2534 (Fam) described this kind of situation as "a fantastic charade with the husband a shady puppet master in the background." The extent of the legal costs in these cases can be staggering with the costs in that particular case amounting to £1.4m by the time of the final hearing.

The Government therefore decided it was time to intervene and offer a means of support to parties in

litigation. This was achieved by way of introducing s.22ZA & B into the Matrimonial Causes Act 1973 ("MCA 1973"). Put simply, these give the Court the power to make an order requiring a spouse to pay to the other spouse a lump sum or periodical payments to enable the applicant spouse to pay their legal fees.

On the face of it, this seems like a strong statement by the Government that the parties should have equal 'fighting funds' in their divorce proceedings.

Previous Situation

While s.22 of the MCA 1973 allows for the possibility of an interim maintenance order, the idea was first explored in the case of *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 FLR 377 where 'maintenance' was defined broadly enough so as to cover legal fees. It was then fleshed out by Wilson LJ in *Currey v Currey (No.2)* [2006] EWCA Civ 1338 back in 2006.

His solution to the problem of a lack of available funds for a spouse was the idea of a 'costs allowance', namely a series of maintenance payments paid by one spouse to the other including provision towards their costs. He proposed a test providing that the applicant must demonstrate that they have insufficient assets to reasonably pay their legal fees and that they must demonstrate that they cannot require their solicitor to take a charge over their assets on settlement (a so-called Sears Tooth agreement).

However, the lasting problem with these "Currey" orders for maintenance was that as the payments were periodical payments, they required one spouse to pay them regularly to the other. This could cause further problems for the applicant spouse as the payments would not necessarily be paid on time and in the correct amount. Periodical payments can have the effect of leaving the recipient psychologically beholden to the other spouse; an effect a lump sum would significantly reduce.

Therefore, when the Government brought in the new

Legal Services Order into the Matrimonial Causes Act 1973, the Court was given the option of either ordering a one-off payment or periodical payments. This introduction of the possibility of ordering a lump sum mirrors the similar provisions offered by the Court in proceedings under Schedule 1 to the Children Act 1989.

The New Situation

The new sections 22ZA & B were introduced by means of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 7) Order 2013 and came into force from 1 April 2013.

The power of the Court under s.22ZA is expressed widely enough to encompass both lump sum orders and periodical payments for a specified period or part of the proceedings. The new law also provides that any order the Court makes under these sections can be backed by an order for sale of real or personal property pre final decree of divorce. This could be a very significant step and gives the Court significantly increased power to protect the applicant and to ensure that they can remain financially secure and able to pursue proper legal representation.

However, sections 22ZA(3) & (4) is not a "quick fix." There are still hurdles for any prospective applicant to overcome. It is sub-section (4) that has the potential to cause the most difficulty for the prospective applicant. This requires that the Court must be convinced that the applicant 'is not reasonably able to secure a loan for the services' and 'the applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings'. In reality, the party relying on the interim lump sum for costs will need to make an unsuccessful application to a specialist commercial lender to provide as evidence to the Court.

Of particular interest is how unreasonable the terms of any potential loan need be and how far will the paternalistic jurisdiction of the Courts extend? Will the Court be required to give guidance as to what



percentage rates of interest, types of security or undertakings are appropriately reasonable? The answer is probably yes. Furthermore, evidence from recent cases suggests that this sub-section will be given a literal interpretation, confirming that if you have the ability to access a loan from a specialist matrimonial lender then you would not have satisfied the Court that you cannot reasonably secure a loan.

Litigation Loans

How easy is it to secure a litigation loan? This can depend on whether security can be provided and the relative strength of that security. In the past, the market was limited to Private Banks who typically only looked to loan to clients who could provide strong security and offer substantial assets for the Bank to manage on settlement. Jason Reeve of specialist matrimonial lenders Novitas noted that increasingly firms that can offer more sophisticated lending facilities are the only option for most applicants, especially where there are no assets over which security can be taken.

These may be cases where all the assets are offshore or in the situation where a Mesher order has been placed over a house (a situation where the sale of the house is postponed and one spouse takes a charge over their proportion of it). In response to these issues, Jason explained that a further option, now available on the market is to obtain an unsecured loan, backed by an insurance policy. This is an attractive option to spouses who know that there are substantial assets available but lack any access to them.

Litigation loans need not always be opposed by the wealthier spouse. In fact, in certain circumstances it will be far better for both spouses if the applicant receives a litigation loan. For example, if a significant proportion of the matrimonial assets are held offshore, then the tax consequences of bringing them back 'onshore' to be distributed to the other spouse may well overshadow the relatively low

cost of interest on a loan. Or, one or both spouses may have liquidity issues such that the only viable route bar a fire sale of assets is indeed to obtain commercial lending. Perhaps one consequence of this new legislation is to have opened up the world of matrimonial litigation funding, providing both parties with a greater number of options for financing divorce pending the final orders. This greater flexibility must be beneficial across a range of individual scenarios.

Conclusion

However the aim of 'equality of arms' in terms of legal funding is reached, whether by Court ordered payment or through commercial lending, this must be seen as a positive in the interests of justice. Perhaps an unforeseen consequence of this legislation is the boost given to the litigation funding arena such that both husbands and wives are better able to secure funding for divorce. We as solicitors take the view that with improved funding, howsoever obtained, we are able to better represent the complex interests of our clients in a wide range of circumstances.



Ann Northover
Partner, Family
DD: +44(0)20 7863 8533
E: ann.northover@forsters.co.uk



Angus Hortop
Trainee Solicitor
E: angus.hortop@forsters.co.uk

This article offers general guidance only. It reflects the law as at October 2014. The circumstances of each case vary and this article should not be relied upon in place of specific legal advice.