

E v F

Jurisdiction:	Jersey
Judge:	Judy Marie O'Sullivan
Judgment Date:	01 November 2016
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Text

[2016] JRC 198B

ROYAL COURT

(Family)

Before:

Judy Marie O'Sullivan, Registrar., Family Division

In the Matter of E v F (Family)

Between
E (the mother)
Applicant
and
F (the father)
Respondent

Advocate C. J. Hillier for the Applicant.

Advocate B. J. Corbett for the Respondent.

Authorities

Children Act 1989.

Child Support Act 1991.

Companies Act 2006.

Children (Jersey) Law 2002.

Family — application by the mother for child maintenance.

REASONS

THE REGISTRAR:

- 1 This is an application by the mother of a child Laura, (this is not her real name), born in 2005 for child maintenance. The parties never married. The mother, Laura and Laura's half-sister, Connie (this is not her real name), live in the UK. Laura attends school in England. She spends 55% of her time with her mother and 45% of her time with her father who spends some of his time with Laura in England. The parties had met in 2003 but the mother relocated to England in March 2006 taking Laura with her. I am told that relations between the parties are acrimonious. Indeed since 2006 there have been nineteen applications in England, fifteen of which were brought by the mother relating both to contact and finances. Only two cases have been concluded by agreement, and the father maintains that the Court has decided largely in his favour in all but two of the cases in which a decision had to be made; this was not challenged by the mother's advocate in the hearing before me.

History

- 2 In 2007 an order was made by District Judge Walker under Schedule 1 of the Children Act 1989 that the father make aggregate payments of £3,433 per month to the mother for the benefit of Laura, to be index linked. A home was to be provided for Laura and her mother to live in, a car to be purchased (and regularly updated for a newer model) and a lump sum payment. Mr Justice Holman in a subsequent judgment of 10th December, 2014, observed that:

“That was a high level of periodical payments in relation to a child then only aged two and a half, given that the father although “a person of significant wealth” was not “fabulously rich.”

The order of 2007 had been on an aggregate basis, enabling the mother to care for a young child. Mr Justice Holman noted that the father has paid in full every penny that has been ordered both as to capital and maintenance. At the time of the order the father had a net income of about £130,303 per annum. The District Judge had assessed the overall capital wealth of the father as being £8,500,000 including the CETV value of his pension funds and capital in trusts.

- 3 In December 2010 the father applied for a downward variation of maintenance. In April 2011 the mother gave birth to Connie by another father, this impacting on her earning capacity. The father considered that with the high level of maintenance he would be supporting another man's child. I was told that the mother asked for an advance payment of costs of £75,000 for a fighting fund in respect of the application, reduced to £50,000 and rather than paying this, the father withdrew it. Thus in July 2012 he agreed to his downward variation application being dismissed and he paid the mother's cost on an indemnity basis.
- 4 In or about March 2014 the father made an application for the level of maintenance to be calculated by the Child Maintenance Service ("CMS"). He was calculated to have a gross income of £385.48 per week or £20,045 per annum. Because of the amount of nights Laura spent with her father, which were considerable, the maintenance was calculated at £26.43 per week. In March and April 2014 the father paid on a voluntary basis £1,500 and now pays £1,000 per month but this has not been formalised into any agreement with the mother.
- 5 The mother applied in April 2014 to a Court for her maintenance to be increased but her application was apparently mislaid by it. She issued a Judgment summons claiming £3,903 as there was a dispute as to when the matter came under the jurisdiction of the CMS but her application was dismissed with costs against her in the Southampton County Court. At about the same time she applied to the Central Court in London for "*full restoration of the previous order*" i.e. the order of District Judge Walker as to child maintenance. She also sought a lump sum order pursuant to paragraph 1(2)(c) and (3) of Schedule 1 of the Children Act 1989.
- 6 The father is habitually resident in Jersey albeit he has two properties in England and spends some of his time with Laura in England. The mother claimed that it was the Courts that had jurisdiction to hear her maintenance application, not the CMS because the father was not habitually resident in the UK, in accordance with Section 44 of the Child Support Act 1991. However section 44(2A) provides that a non-resident parent can come within the remit of the CMS if he is employed by a company of a prescribed description registered under the Companies Act 2006. The father is employed by such a company and therefore falls within the ambit of Section 44 even though he is habitually resident in Jersey. In June 2014, the CMS wrote to the mother:

"a person does not have to be present in the UK at all times to be habitually resident. They may be habitually resident in more than one country ... However, we were able to accept [the father's] application after considering other factors,

namely that he has an interest in the UK as a director of a company based here.”

- 7 The mother did not accept this and appealed to the First Tier Tribunal which exists within the statutory appellate structure of the Child Support Scheme, maintaining the company was not of a “*prescribed description*” because the father owned 99.8% of the issued shares in the company. Mr Justice Holman in his judgment dated the 10th December, 2014, stated:-

“To my mind the law is crystal clear... She has her avenue of appeal to the First Tier Tribunal”.

In respect of the mother's application for a lump sum which he was hearing, he was concerned not to award her maintenance disguised as a lump sum, given the Court order had ceased to have effect. However it was agreed there would be payment in respect of repairs to the property. The mother wanted a lump sum to fund her costs in respect of an appeal to the Tribunal and was awarded £10,000 inclusive of VAT. The father had to pay the money to her lawyers and they had to refund the father if any monies were not spent.

- 8 In May 2015, directions had been made for the father to provide documentary evidence, inter alia as to his contract of employment with A Ltd and work done for it, in respect of the terms of a requirement to live/work outside England, his shareholdings, monies received by him from companies in which he had a shareholding and tax returns in the UK, Jersey and elsewhere, trust accounts for F Trust and schedules of all bank accounts in any jurisdiction and schedule of interest received from them. The tribunal were about to do a comprehensive assessment of both parties. However, the mother then withdrew her application in October 2015 apparently because she was advised there was no scope to consider any income falling outside the Act. No decision has therefore been made by the Tribunal.
- 9 In December 2015 the mother started this application in Jersey but there have been proceedings in England taking place since December 2015 about Laura's schooling and repairs to a boiler. In May 2016 an English judge made an order pursuant to s91(4) of the Children Act 1989 preventing any further applications regarding Laura, and retained a prohibited steps order that the mother wanted lifting. The issues of the boiler was apparently settled by consent.

The Law

- 10 Both the mother and father were invited to file and serve skeleton arguments as to why Jersey is or is not the appropriate forum to hear the mother's application for child maintenance. It is agreed by both parties that the Jersey Court has jurisdiction to do so under paragraph 11(1) of Schedule 1 of the Children (Jersey) Law 2002 (“the Law”):-

“(1) Where one parent of a child lives in Jersey and the child lives outside Jersey with another parent, a guardian or a person in whose favour a residence order is in force with respect to the child, the court shall have power, on an application made by the person with whom the child lives, to make one or both of the orders mentioned under paragraph 1(1)(a)(i) or (ii) against the parent living in Jersey .

(2) Any reference in this Law to the powers of the court under paragraph 1(1) or to an order made under that sub-paragraph shall include a reference to the powers which the court has or to an order made by virtue of sub-paragraph (1) of this paragraph .”

Paragraph 1(1)(a)(i) refers to periodical payments and (ii) refers to secured periodical payments. What this does mean is that no orders can be made for a lump sum or property order in Jersey as Laura and her mother live in England.

- 11 The issue is whether the Jersey Court should entertain her application for child maintenance.
- 12 The skeleton on behalf of the mother in respect of forum and *res judicata* stated only the following:-

“The Court, in the appended Act of Court dated 17 May 2016 required that a Skeleton Argument should be filed addressing the issue of forum. This is a question of law and procedure in England and Wales (whether before the English Court or the CMS Tribunal). Accordingly the applicant has obtained Counsel's Opinion, a copy of which is appended (divider 6);

Accordingly the Court is invited to find that Jersey is the correct forum to hear this discrete application and further that the matter is not Res Judicata for the reasons set out in Counsel's opinion”.

- 13 However the issue of forum is a matter for the Jersey Court applying Jersey law.
- 14 A Counsel's opinion was attached to the skeleton arguments submitted on behalf of the mother regarding legislation and procedure concerning Child Maintenance Service hearings before the First Tier and Upper Tribunals in England and Wales. English Counsel says in parts of paragraphs 30, 31 and 32:-

“... the CMS therefore retains important information-seeking powers in order to determine a non-resident parent's level of income, regardless of whether it has been disclosed to HMRC.

It is not clear if the CMS used these powers in order to fully investigate the father when making their assessment.

In conclusion it would appear the father will struggle in his argument that the matter is res judicata."

- 15 There has been no decision of the Tribunal. Her counsel considers that any further CMS tribunal hearing would be nugatory because of the restrictions placed on the CMS in determining the father's income. As he states, however, it is not clear as to what was investigated, and the disclosure that had been ordered which has not been considered by the Tribunal as the mother withdrew her appeal. She can, her counsel says, in theory ask the Upper Tribunal to grant her an extension of time to hear her application for permission to appeal but needs strong reasons to do so; in any case she retains the right to make an application for variation at any time and has the right to another appeal when the calculations are updated. The father's maintenance liability was based on historic income, but she can, he says, ask for maintenance to be assessed on current income if it differs by more than 25%. The rules are complex but the income considered is earned or pension income taxable by Her Majesty's Revenue and Customs ("HMRC"), whether or not disclosed. The CMS can arrive at a different determination from HMRC in assessing a non-resident person's income. The father's advocate states that counsel does not mention that the CMS can also take into account unearned income chargeable to UK tax where there is an application for a variation and the mother had an application in respect of unearned income before she withdrew her appeal. As to non-UK income, the CMS may make assumptions as to facts and can look beyond the information provided by HMRC. Counsel says however that for various reasons if the father contends the CMS have already analysed his global finances it is unlikely that such an argument could get off the ground. The father accepts that his lifestyle or assets are unlikely to be taken into account in order to provide more maintenance. However, the mother chose to abandon her appeal not only in respect of jurisdiction but also this part of her appeal.
- 16 The mother's advocate submits she is not forum shopping in bringing a case in Jersey as there were assets not considered in the English proceedings. The mother's advocate was invited to say whether she would be applying for lump sums in the future but was not prepared to commit her either way. Laura is only 11 so there is a possibility there will be further lump sum applications from time to time in an English court.
- 17 The father contends that his assets were considered in 2007, when a property was provided for Laura and the mother until Laura is 21 and a lump sum order was made at that time. Both in Jersey and in England only one property order can be made although, as has been seen by the history of the case, the Court can make several lump sum orders, but no lump sums orders could be made if the case transferred to Jersey. See Paragraph 11(1) of the Law. The father's advocate submitted he does not deny he has a home in Jersey and two in England but his worldwide income is included in his Jersey tax return. In the bundle was his Jersey 2014 Notice of Assessment showing total gross worldwide income assessed as only £26,021 gross, £24,840.54 net. The mother's advocate posed the question of how he has managed to pay £1,000 per month, but it was submitted that he is using savings to fund his commitments to Laura. Indeed it was accepted on behalf of the mother that the father is living off his capital. The mother contends that she would get more

in a Jersey Court but the father counters this by saying that any claim in Jersey is likely to be nugatory due to his income, he pays Laura's school fees, and pays the travel costs all of which the Court would have to take into account. He has Laura for 45% of her time. The house for the mother, Laura and indeed Connie and a car is provided by the father. Connie's father is a solicitor working in a City law firm in London so there would need to be an examination of what he is contributing towards Connie's needs and towards the overall household needs. As Laura is now 11 and Connie 5 the father would, I am told, be asking about the mother's earning capacity; she currently only earns £300 per month.

- 18 It seems that the mother is seeking to cherry pick the bits of legislation in England and then in Jersey to suit her needs. She wants to see if she can fare better in Jersey. It is unreasonable to take advantage of both jurisdictions against the background of 10 years of litigation in England and the fact that she has not exhausted her remedies in England and can make a further application in England, to include further lump sum claims. An issue has been decided in England made about child maintenance and if the mother is unhappy she can apply for an extension of time or seek a reassessment and appeal if she considers it appropriate to do so.
- 19 The father's lawyer referred to the harm caused to Laura by continuing litigation. It was agreed the parties do try and mediate. The father proposed a mediator in Jersey who the mother rejected but she did not propose any English mediators, despite being a mediator herself. The mother said that she considered various non-based Jersey mediators but wanted full disclosure prior to the mediation and no agreement has been possible. The father's advocate submitted that disclosure could be made during the course of mediation. The father's advocate submitted that the mother refused to progress mediation and he would have been happy to pay for the mediation had he been asked to do so but she wanted to continue with the proceedings which is why mediation did not take place. Bearing in mind that the mother is a mediator herself, I cannot see why she did not attempt mediation first.
- 20 For the reasons stated above, I am refusing the application by the mother for her child maintenance application to be heard in the Royal Court of Jersey. The father's advocate sought costs from her and produced a schedule of costs. I find that the mother should pay the father's costs on a standard basis, to be taxed if not agreed. The mother has the benefit of a Jersey legal aid certificate, so the costs are not to be enforced without leave of the Court.