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Case No: ZC20P04083

IN THE FAMILY COURT
SITTING AT THE ROYAL COURTS OF JUSTICE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/04/2025

Before :

THE HONOURABLE MR JUSTICE TROWELL

- -

Between :

A **Applicant**

- and –

B **Respondent**

- -
- -

Tim Amos KC (instructed by **Hughes Fowler Carruthers**) for the **Applicant**
Kate Ozwell (instructed by **Charles Russell Speechlys LLP**) for the **Respondent**

Hearing dates: 10 April 2025

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ANONYMISED JUDGMENT

This judgment was handed down remotely at 10.30am on 14 April 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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THE HONOURABLE MR JUSTICE TROWELL

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of

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The judgment was delivered in private. The judge has given leave for this anonymised version of the judgment to be published. Nobody may be identified by name or location. The anonymity of everyone other than the lawyers must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mr Justice Trowell:

1. This is a judgment in the application for a lump sum for litigation costs funding brought by A against B under Schedule 1 to the Children Act 1989. I shall refer to the parties as respectively mother and father hereafter. I apologise to them for doing so, but I expect that in accordance with the principles of transparency this judgment will in time be anonymised and sent to the National Archives.

2. The mother is represented by Mr Amos KC and the father by Ms Ozwell. The case was transferred to me at the last minute. I am particularly grateful to counsel for patiently waiting while I read into the case and then presenting the matter to me as clearly as they did. I set out to counsel at the beginning of the hearing the documents that I had read and made clear that I had not read everything in the two bundles that were put before me. I have read the statements of both parties, and Frances Hughes (the mother's solicitor) and the judgment of Francis J of July 2022 and the other documents to which I was taken by counsel during the hearing. I heard no oral evidence.

3. As a consequence, in part of the time it took me to read in to the case and in part because of the full submissions I received, I was unable to give an oral judgment at the conclusion of the hearing on the 10 April 2025, and I write this on the 11 April 2025 with time fortunately arising from the adjournment of another matter. Nonetheless the pressure of time means I am going to need to take matters more briefly than would be necessary to do full justice to the careful arguments of counsel.

4. Mr Amos seeks:

    a. A fund of £283,958 (I shall ignore the pence) to meet costs up to and including a final hearing in an application already issued in relation to child arrangements and associated matters under section 8 of the Children Act.

    b. The costs of this hearing put at £48,347.

    c. And a war chest of £50,000 to deal with future applications.

5. Ms Ozwell seeks her costs of this hearing put at £51,940. She says that there should be no order made on the application.

6. At this preliminary stage, I make the following points which curtail the arguments that I will deal with in this judgment:

    a. I will not deal with costs of this application here. There may be without prejudice offers that I need to consider after I have given this judgment. I will have to deal with costs on the papers with written submissions in due course.

    b. There is an acknowledged double counting by the mother as to £10,436 in the £283,858 and the £48,347. I deduct that from the £283,958 leaving £273,522.

    c. I will not deal with the war chest argument here. This application is brought on at short notice as effectively an interlocutory application to allow costs to be met in the section 8 Children Act application. The war chest argument does not require urgent determination.

The Background

7. This will necessarily be taken very summarily, given the very large amount of litigation there has been between the parties.

8. The child at the heart of these proceedings is (hereafter C) who is aged 10. He lives with the mother in London. The father lives in Territory A, having moved there last year from London. The move is the subject of some dispute. It is not necessary for me to explore the dispute. The father says he was previously diagnosed with Chronic Lymphatic Type A (or CLL-A) and had cancer surgery in the summer of 2024.

9. The parties were a couple. They separated in 2018 when living in Territory B. The mother brought C back to this country. Hague return proceedings were brought by the father, and the mother was ordered in 2018 to return C to Territory B. She did so. It is notable that Francis J, who made the return order, set out in subsequent Schedule 1 proceedings in 2022 that he was troubled greatly when he made the order and reflected that 'from time to time, judges find themselves making return orders which they, frankly, do not wish to make and would not make if they were to apply the welfare principle'.

10. In 2019 relocation proceedings were brought in Territory B and Judge NL made an order allowing the mother and C to relocate to this country.

11. There were section 8 proceedings in this country culminating in a judgment of HHJ Harris in February 2022.

12. There were Schedule 1 proceedings for housing and other financial provision leading to a judgment by Francis J in July 2022.

13. There were further Schedule 1 proceedings relating to security which led to orders in November 2023.

14. There had been a mutual section 91 (14) order prohibiting applications under section 8 without leave of the court imposed by HHJ Harris. That expired in February 2024.

15. There is a similar mutual section 91 (14) order prohibiting applications under Schedule 1 without leave of the court imposed by Francis J. That runs to the 8 July 2027. It needs to be noted in relation to that Francis J says, 'I am going to make an order pursuant to s.91(14), and I think it is sensible to apply this to both parties, although, in fact, there is no reason, in reality, to make it against the mother, but I think just so that it has a balance I am going to make an order that neither party can apply to the court ….without the permission of the court.'

16. In October 2024 the mother issued a C100 application seeking variations of the child arrangements. She said these issues arise in large part because of the father moving to Territory A over the summer of 2024.

17. As a consequence of the C100 application a safeguarding letter was received from Cafcass on the 28 February 2025 (notwithstanding it is dated the 7 January 2025) this recorded that in in December 2023 the father had told his GP that he has difficulties with intense feelings of anger, that he loses control, he can have violent thoughts (such as hitting his partner and throwing objects) and he can shout and has grabbed his partner by the wrist and hair. (The partner referred to is his new partner.)

18. As a consequence, I understand, of an application made by the father in relation to C's passport there was a hearing on the 19 March 2025, at which this issue was raised by the mother who was concerned about C's safety. That issue was resolved by a conversation with the father's nanny but inevitably more costs were incurred.

19. The mother brought applications for the matter before me today and permission to bring that application, by D11s dated in December 2024 but issued in March 2025. Poole J gave leave on the papers on the 1 April 2025 and listed the matter which has come before me on the 10 April 2025.

20. There is unequivocal condemnation of the father's behaviour by Francis J throughout his 2022 judgment. Many excerpts are set out in the statement of the mother. I note some of them below:

> Para 6: [the father] has, …shown an almost complete absence of emotional intelligence or understanding in relation to the issues that are before the court and the issues that affect his child and former partner.
>
> Para 11: I am afraid I have to conclude that the father is anything but reasonable.
>
> Para 14: [the litigation between the parties is] one of the most shameless pieces of litigation that I have experienced in nearly 6 years as a full-time judge of the division…
>
> Para 32: From the date of separation in October 2018 until November 2020, the father refused to pay anything at all in maintenance…This was, in my judgment, disgraceful conduct…and adds support to the mother's contention that she was subjected to coercive and controlling behaviour by him.
>
> Para 42: Having heard the case now in full, the litigation, I find, is almost entirely a consequence of the father's relentless, unsympathetic, and oppressive conduct. Armed as he is, with the luxury of immense wealth, whilst not any longer having to go out to work, he has endless time and resources to pursue litigation, which he has done with a vigour which I have rarely, if ever, seen in the context of Family Law. One has to only look at the figure of about £5.5 million on costs…

21. The father tells me in his statement that he has reflected on that judgment and matters have moved on considerably. Ms Ozwell urges on me that although the father does not seek to escape from the observations of Francis J, he should be given the benefit of reflection and learning and development. Mr Amos tells me that reform would be tantamount to a leopard changing its spots, and I should be sceptical of accepting any such submissions, but above and beyond any change to the father, he tells me that I have to bear in mind that the mother has been damaged by the way the father has treated her previously. I hope that the father has reflected on the condemnation of his behaviour by Francis J. I am concerned that may not be the case, not least because he says in his statement that references to Francis J's judgment by the mother in her statement are an attempt to 'taint [him] in the eyes of the court', but I have heard no oral evidence and will make no findings as to any reformation. The second argument of Mr Amos, that the mother has been damaged by what has happened, is both convincing and sufficient for the purposes of the decisions I need to make.

The law and the issues

22. Counsel agree in pointing me to the decision of Cobb J in *Re Z (Schedule 1: legal costs funding order; interim financial provision)* [2020] EWFC 801 as a summary of the principles I should apply, and the relevance of the parallel principles set out in section 22 ZA of the Matrimonial Causes Act 1973 and developed by Mostyn J in *Rubin v Rubin* [2014] 2 FLR 1018.

23. The issues between the parties in applying the law to this case are:

    a. Can the mother reasonably pay for these proceedings herself?

    b. Should this matter simply be referred to some form of mediation, for which the father would pay?

    c. And linked to that, are the issues to be dealt with in the mother's section 8 application requiring the court's attention at all?

    d. Further, if some sum needs to be paid:

        i. Should it only be up to a DRA?

        ii. Should it exclude costs already incurred?

        iii. Should it otherwise be reduced?

24. I will consider these in turn, but I do note that it will be necessary for me to return to the first issue when I come to a conclusion as to the sum that should be paid.

Conclusions on the issues

<u>Can the mother reasonably pay her costs herself?</u>

25. The father accepts that he is able to meet the mother's legal costs. He had taken the millionaire's defence in 2022. He asserts now that he was worth then some £52 million but is now worth £25 million of which his 'unpledged' cash reserves are £870,000.

26. The mother has a flat in London which was valued at £2.15 million in the 2022 proceedings. She says that it would be unreasonable for her to have to mortgage or sell that property to meet her legal costs and points to the fact that Francis J expressly said that she should be able to keep it and benefit from the rent that will be produced by letting it.

27. The mother has cash of about £350,000 but about £50,000 of that is earmarked for an exceptional service charge on her flat. I note at this stage that she was not upfront in setting out what was in her bank account. Ms Hughes had said in her statement that it 'would be completely exhausted if she had to meet her legal costs from it' which led me to assume that it had about £300,000 in it, but it would have been appropriate for the balance of the account to have been clearly set out in a statement in advance of the hearing rather than the figures only being revealed when I questioned Mr Amos about it. The mother says that it is necessary for her to retain this fund because she uses it to

supplement her outgoings. She says that her earning capacity has been massively affected by now being C's mother, so she is not able to generate an income as she had previously done. Mr Amos was able to show in rough terms that her net non-property resources had reduced since 2022. He was not able to show that her income had fallen since the Schedule 1 hearing before Francis J, but I understand that in reality the mother is pointing to the comparison between what she earns now and what she earned before having C.

28. The mother has a net income of about £60,000 from rent and consultancy earnings and is in receipt of child periodical payments of about £140,000 for C. She lives in the Schedule 1 accommodation provided for C.

29. She has shown that two attempts to raise a litigation loan have been refused.

30. The point taken by the father, and arithmetically accepted by the mother, is that she can pay her costs - if from nowhere else then from her bank account.

31. The argument is whether the mother can demonstrate that unless a costs allowance is made, she would not reasonably be able to obtain appropriate legal services.

32. In short, should the mother use her savings or mortgage her flat.

33. I remind myself of paragraph 13 (v) of *Rubin.* Mostyn J says there, in the context of section 22 ZA of the Matrimonial Causes Act, that the court would be unlikely to expect an applicant to sell or charge her home or deplete a modest fund of savings. He says, and I agree, that 'this aspect [of judicial evaluation] is highly fact specific'. Given this is a Schedule 1 case, when C grows up the mother will need to leave her current home, lose any benefit of his maintenance, and need to start providing for herself again after years of reduced earnings. I therefore need no persuading that she cannot reasonably charge or sell her flat. I have thought harder about the £300,000 of savings. It was urged on me that this was paid to her to recompense her for the fact that she had not received maintenance in Territory B and so had had to spend her own resources. Its origin does not seem to me to be determinative. I do however conclude that it is not reasonable to expect the mother to exhaust this fund to meet her costs in this litigation. I reach this conclusion because (i) I consider it modest in the context of the father's resources; (ii) I consider it modest in the context of the £5.5 million that Francis J said had been spent on costs as a consequence of the father's approach to litigation; and (iii) I consider it appropriate for the mother to have some funds of her own to provide her with something to deal with occasional contingencies of life and in due course the inevitable end of child support. I do not however rule this money out as a source of some funds for the mother, should I, for instance, not be with her in relation to some historic costs, or in relation to points on liquidity.

<u>Should the matter just be referred to mediation?</u>

34. The father has offered to pay for mediation. Should I just send the matter to mediation and not make a costs allowance at all?

35. I record at this stage that the issues raised in the mother's C100 do appear to be matters that the parties should (in a normal case) be able to sort out without the necessity of a final hearing. In broad terms she wants to ensure that, save for agreement, termtime

contact takes place in England (rather than Territory A, or nearby), that the existing contact order be adjusted in relation to holidays and special days, that there be a discharge of a specific issue order in relation to C's attendance at a language club, that there be variation of passport holding arrangements, and that there be a fresh s. 91(14) order.

36. There are two problems though with the suggestion of simply referring the matter to mediation. First, given what the mother has experienced from the father she cannot just sit down in a room with him and a mediator. She has been harmed by what she has lived through. She reasonably needs the support of a legal team around her. Second, the father's proposal does not extend to meeting her legal costs – indeed that is what this hearing is about. So, although I could agree that private arbitration might work as readily as court, or indeed a private dispute resolution appointment might work, those forms of NCDR will have legal costs parallel to those we are arguing about.

Does the application require the court's attention?

37. It is argued that the variations to the order that the mother seeks are unnecessary or so minor as to not warrant funding. This argument is very similar to the one explored above. I am in no position to say that the variations the mother seeks are right or wrong. I accept that they are not fundamental, and I would hope that the parties can agree how to deal with the variations the mother proposes. In the light of the history of this matter and the exchanges between the parties on these issues so far I cannot have confidence that they will be agreed and if they cannot be agreed I do not accept in the light of this case that they are so minor as not to require determination.

The sum to be paid.

38. I have already deducted the approximate £10,000 of double counted costs. That takes the figure sought down to £273,522.

Up to DRA only?

39. I agree with Ms Ozwell that just as in financial remedy proceedings where LSPO is broken down into provision as to (i) up to FDR with (ii) a further hearing thereafter if the matter does not settle to make provision to trial, it would be sensible to break these costs down into (i) a sum up to DRA with (ii) a further hearing for further provision thereafter. That would have the advantage of allowing the father to run after the DRA an argument that the mother is being unreasonable in the litigation (if she is – which I make clear I do not have reason to anticipate) and it would have the advantage of focussing minds on settlement at the DRA.

40. My difficulty is that the schedule I have does not provide a breakdown in costs before and after DRA. I do urge that hereafter in Schedule 1 proceedings relating to funding Children Act proceedings solicitors prepare a schedule which breaks down costs up to DRA and after in an analogous way as they would in financial remedy proceedings. I have dealt with this failure to divide the costs by deduction from the £221,312 sought to take matters forward to and including final hearing the following sums:

a. £45,360 being attendance costs for solicitors at the final hearing (£12,800 + £2,560 VAT) and counsel (£30,000).

b. Deducting 1/3 of the total solicitor's costs excluding the attendance at hearings, namely £40,144. (£122,760 - £12,800 - £4800 - £4800 = £100,360; 1/3 = £33,453; add VAT = £40,144).

That leaves me with costs going forward to get to the DRA of £135,808. As a cross check I note that it will mean that the costs to the final hearing from the DRA would be £85,504. I record that Ms Ozwell urged me to reduce the solicitor's costs in half rather than by a third. I have rejected that as too harsh where I have taken out counsel's costs and attendance costs which are a large part of the extra costs of the final hearing.

41. I acknowledge that there is an arbitrariness in this assessment, but I am engaged in a rough and ready reckoning. In so far as there is over provision the normal undertaking to pay back what has not been spent will cover the father, in so far as there is under provision the mother may need to look to her savings account in the short term. In both cases there is also the possibility of seeking a costs order to remedy the situation at the end of the case.

Historic costs

42. The mother has paid costs up to November 2024 of £11,676. I cannot see how these can form part of her claim. She has paid them; she must have had means to pay them. They do not form part of a litigation funding application.

43. The mother has unpaid billed costs either up to November or December 2024 of £10,667. I have not had an explanation of the change in the date from November to December between one schedule and another. The November date makes more sense because the next heading is 'Unpaid billed costs from 1 November 2024'. I shall assume the November date because otherwise I have overlap. Ms Hughes tells me that, if she is to carry on with the case, she needs her past fees paid. I accept that. Ms Ozwell objects these costs have arisen because the mother has dealt with all interactions with the father through solicitor's correspondence rather than through a parenting app as HHJ Harris had required. I understand the mother's desire to have Ms Hughes support in the circumstances of this case but given the direction of HHJ Harris and the ability which there is here for the mother to pay some costs through her savings account, I do not require the father to pay this sum. Ms Hughes should be paid but by the mother.

44. There is a figure of unpaid billed costs from the 1 November to 31 March 2025 of £40,302. I have effectively already deducted some £10,436 from this in relation to today. Ms Ozwell objects that £25,979 of this relate to the hearing in March. That is the mother's figure in the N260 prepared for that hearing. She says to me that I should deduct that figure because there is a costs order in relation to it, namely both sides applied for their costs and the court directed that the costs are reserved.

45. There is force in her objection. If the mother were to receive a costs order in relation to this figure, then there would be double recovery. I could deal with that by setting out here that the parties should draw any order I make in relation to this sum to the court's attention when it returns to consider the reserved costs order.

46. On the other hand, the deferral of recovery which is the consequence of a costs reserved order can present a cash flow problem. In the circumstances of this case that cash flow problem can be dealt with by using money in the mother's savings account.

47. The most forceful argument for the payment of this money now is that it is entirely reasonable for the mother to seek reassurance from the father's nanny in the light of the safeguarding letter from Cafcass. However powerful that might appear to me I must recognise that it is an argument to be had when the reserved costs are considered and that there might be a response that can be raised by the father. So, I conclude that I must similarly leave that out of this order. It is a matter to be dealt with when the reserved costs are considered.

Other reductions

48. Ms Ozwell says I should not allow £5000 for an ISW. I agree. None has been ordered as yet. It may be none is necessary. I do however say that should the court subsequently say one is necessary that it should be drawn to the court's attention that it does seem to me, on the information I currently have, that it should be paid for by the father.

49. Ms Ozwell says that I should generally reduce the whole budget, either just because I would if I were taxing costs, or because the mother is requiring over representation. She notes here the seniority of Ms Hughes and the fact that Mr Amos is leading counsel. I might add that proposed future counsel is Deirdre Fottrell KC. Given the history of this case, I reject that submission. It is understandable and given the availability of resources and the historic willingness of the father to incur costs for himself, it is appropriate for the mother to have top level representation. Further, I note that even though he did not instruct leading counsel for this hearing the father had spent more on it than the mother.

Conclusion

50. I have deducted from the £273,522 set out above the following:

    a. £85,504, given that I am making at this stage an order up to DRA only. If this matter does not settle at that stage there will, subject to an unreasonableness argument be good reason for recovery of a sum of that order at that stage to take the matter to final hearing.

    b. £22,344 being the paid £11,676 and the billed but unpaid £10,667 preceding November (or December 2024).

    c. £25,978 being the costs sum already claimed and so far reserved.

    d. £5,000 for an ISW, on the basis if one is needed I anticipate, on what is before me, the father should be required to pay.

51. This gives a total of £134,696. I pause and ask myself again whether given this is the figure I consider appropriate to order it would be reasonable for the mother to meet this

herself from her £300,000. Again, I consider it would not be, particularly when I consider that the £300,000 is being depleted by the unpaid billed costs of £10,667 and £25,978 of costs which at this stage are reserved. (Not to mention the £48,347 of costs for this hearing which I still need to rule on.)

52. As to how it should be paid, I consider it should be paid over time. The FHDRA is on the 8 May 2025 and the best estimate we have been able to make is the DRA will be in about 6 months. To enable preparation for the 8 May 2025 there is going to need to be a significant prompt payment. I direct £30,000 on the 1 May. The balance can be paid over the next 5 months on the first of the following month at the rate of £20,939 per month. I consider a series of lump sums is the natural way to deal with this.

53. There are the following further points that I should recap on and for which counsel will need to provide in the order drawn after this judgment:

    a. The Schedule 1 application should be relisted for further consideration at the conclusion of the DRA. I suggest that should be transferred to be heard in the CFC and indeed it should immediately follow the DRA before the same judge because unlike an FDR there is no waiver of privilege. I am prepared to have argument in writing on this point if there is disagreement.

    b. I am adjourning the claim for a £50,000 war chest to the same hearing and similarly consider that it should be heard immediately after the section 8 proceedings rather than having a separate hearing on a different day. I am similarly prepared to have argument in writing on this point.

    c. I handed down the judgment in draft and have now received costs submissions which I have dealt with separately in a summary judgment. I thank counsel for correcting typographical errors.

54. Finally, it is necessary to pause and reflect on all sides of this case. Around £100,000 has been spent on this hearing alone. Do not let this dispute become any bigger.

Mr Justice Trowell

29 April 2025