



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 may be a contempt of court.

Neutral Citation Number: [2024] EWFC 109 (Fam)

Case No: BV15D15323

**IN THE FAMILY COURT**  
**SITTING AT THE ROYAL COURTS OF JUSTICE**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 24 May 2024

**Before :**

**MR JUSTICE PEEL**

**Between :**

**C**

**Applicant**

**- and -**

**S**

**Respondent**

**Peter Newman (instructed by Irwin Mitchell LLP) for the Applicant**  
**The Respondent in person**

Hearing date: 15 May 2024

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 24 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....  
MR JUSTICE PEEL

**Mr Justice Peel :**

Introduction

1. I shall refer to the parties as H (the husband) and W (the wife), notwithstanding that they were divorced many years ago.
2. The application before me, issued by H in Form D11 dated 13 March 2024, is in respect of implementation of specific parts of an order made by Roberts J on 8 October 2020, after a final hearing reported as **S v C [2020] EWHC 2127 (Fam)**. The issue relates to monies held for the benefit of their 10-year-old child (to whom I shall refer as A) who has lifelong care needs as a result of a chromosomal disorder. The monies derive from a damages award of £5m arising out of a successful damages claim brought by H and W relating to the antenatal care provided to W during her pregnancy.
3. Roberts J said in her judgment at paragraph 3: “It is a matter of much sadness and regret to this court that this litigation (and the inability of these parents to find a solution for their daughter’s benefit) has led to the complete breakdown of any last shreds of a co-parenting relationship”. Depressingly, there has been no improvement in their poor relationship which has, I am sure, contributed to their inability to reach agreement on this application. Nevertheless, one glimmer of hope is that A does spend time with them both; W is her primary carer, and she spends between 25% and 33% of the time with H.
4. H’s application is as follows:
  - a. By the order of 8 October 2020, he has invested £650,000 into a property in London on behalf of A who is 10 years old, and £250,000 in a bank account, again on behalf of A. The property was bought with the intention that it would be occupied by H and, when she is with him, A.
  - b. There is a mortgage with RBC in the sum of £1m secured on the property. The mortgage term comes to an end in August 2024. H seeks court permission to remortgage with a different lender. H is concerned that the order of Roberts J at paragraph 24(a)(ii) on one reading only entitles him to secure this particular mortgage with RBC on this particular property and does not entitle him to remortgage without permission of the court, although he says that was never the intention behind the order. He has made this application out of an abundance of caution. For my own part, the order read as a whole does not seem to me to require permission for a remortgage, not least because paragraph 24(d) clearly envisages the possibility of remortgage. Further, the structure of the order as a whole is clearly intended to enable H to utilise the monies towards housing provided that at all times such monies are protected in the manner set out in the order. If H is not permitted to remortgage, he would have to sell the property as he cannot redeem the mortgage from other funds. In any event, paragraph 25 expressly reserves to the court the power to permit H to arrange alternative security and paragraph 50 contains the standard

general liberty to apply in respect of implementation. I am quite satisfied that I have the power to make the order sought if appropriate.

- c. Further, he seeks to apply the £250,000 currently held in a bank account into the property. Under the terms of paragraph 24(c)(ii) of the order, H requires the permission of W or an order of the court to do so. W does not consent. Hence H needs court permission to take this step. If approved, the remortgage required would then be £750,000 rather than £1m.
5. The application was listed first before me on 11 April 2024. W instructed solicitors late the afternoon before, even though she had been served with the application on 27 March 2024. On the day of the hearing, her counsel sought an adjournment so that W could give full instructions to her legal team. I granted the adjournment application and relisted for today. I made a direction that W should (if so advised) file a witness statement by 25 April 2024 setting out her objections to the order sought by H. Although I accept that W's legal team had very little time to prepare for the case, it struck me as surprising that W was unable at the hearing on 11 April 2024 to articulate through counsel at that stage what her objection was, even if only in broad terms.
  6. W did not file a statement setting out her objections to the order sought by H. On 10 May 2024 she filed a Notice of acting in person.
  7. At the adjourned hearing, W appeared in person. H continued to be represented. I permitted W's mother to assist her as a McKenzie friend. W applied for a further adjournment to enable her to engage new solicitors. I refused the application for the following reasons:
    - a. W has been aware of the issues since September 2023.
    - b. H's application was issued over two months ago.
    - c. She instructed solicitors at the eleventh hour, just before the last hearing. I granted an adjournment then, but made it clear it would be for a limited time.
    - d. W has not filed any evidence, even though she had solicitors on the record.
    - e. She dispensed with the services of her solicitors very recently.
    - f. From H's perspective, there is some urgency. His tenancy comes to an end, and he needs to be able to move into the property in the next two weeks.
  8. Having refused the application for an adjournment, I heard from H's counsel and from W. W was courteous and made her points concisely. She was clearly very familiar with the case, and I do not consider she was unduly disadvantaged by being a litigant in person. At the conclusion of the hearing, she asked to be allowed to put in a document setting out her points overnight, which I agreed to. H then put in a response and, with my leave, W put in a detailed written rejoinder to H's document. I have had these documents in mind when preparing this judgment.

### Background

9. At a time when the wrongful birth action had not been issued, but had been foreshadowed in pre-action proceedings, a financial remedies consent order was made

on 23 May 2016 by DJ Gibbons in the Central Family Court. Its principal provisions, so far as relevant to this application, were:

- a. At paragraph 14 the order recorded: “The parties agree that they will continue to have joint conduct of the personal injury claim being pursued by them on behalf of the child of the family: and they will invest and apply any such monies for the benefit of the child.” The outcome of the litigation was at that time unknown.
- b. A division of liquid capital broadly in W’s favour as the order recorded at paragraph 17.
- c. A nominal periodical payments order in favour of W which was subsequently discharged by agreement.
- d. Child maintenance payable by H to W for the benefit of A.

10. In September 2016 the wrongful birth claim was issued in the Queen’s Bench Division (as it then was).
11. In January 2019 the claim was settled on the basis of award of £5m.
12. An issue seems to have arisen about the beneficial ownership of the monies. In August 2019 W issued a Form A seeking determination as to how the said monies should be distributed or otherwise held.
13. On a date in 2019 which is not clear, an interim order by consent was made providing that each party owned 50% of the monies, which would be held by the parties pending determination of the application.
14. The matter came on for final hearing before Roberts J in July 2020. By then the monies emanating from the wrongful birth claim were £3.74m, the original £5m figure having been eroded principally by legal costs. The total liquid/realisable assets of the parties were an additional £1,186,056. Further, W was the beneficiary of what appears to have been a substantial family trust, and H had various business interests.
15. The sole issue before the judge was how to dispose of the compensation monies. In her comprehensive judgment, Roberts J concluded that:
  - a. Each party should hold £900,000 respectively for A (thus, £1.8m in total), such sum to be used in purchasing accommodation to be occupied by each party and A. The said sum would be expressed as a percentage of the relevant property, to be realised and paid to A upon specific trigger events; the death of each party, each party’s election or court order. By this process, accommodation for A with each party was secured on a long-term basis, beyond her minority, subject to alteration by the court.
  - b. The balance of the monies (a further £1.94m) would be retained unconditionally by each party.
16. By the time the order was made, it was clear that:

- a. As had been intimated at trial, W would use the £900,000 to redeem the mortgage on her London property. In fact, she had already done so by the time of the order.
  - b. H intended to buy a London property for £1,650,000, using £650,000 out of the £900,000, and taking on a mortgage of £1 million. The balance of £250,000 would be placed in a bank account.
17. These arrangements were recorded and approved in the final order. The order itself is lengthy and a little convoluted, but it incorporated a series of protective measures to ensure that the value to A of the £900,000 utilised by each party would not be diminished. Provisions included:
- a. H could apply the monies either by way of acquiring a property interest, or placing them in a bank account.
  - b. W to execute a charge over her property in A's favour (expressed as a percentage of the gross property value) and to have the right to purchase a replacement property on the same terms.
  - c. H to pay £650,000 of the £900,000 towards purchase of a property, and place £250,000 in a bank account.
  - d. H to have the right to acquire a replacement property.
  - e. H to execute a deed declaring a beneficial interest in A's favour.
  - f. W to pay A, upon the first to occur of the trigger events, a lump sum equal to the specified percentage of the gross value of her property.
  - g. H to pay A, upon the first to occur of the trigger events, a lump sum equal to the specified percentage interest in the Deed. That lump sum was referable to the full £900,000, rather than £250,000 so as to provide security within the property.
18. In due course, H bought his London property, but, partly because of Covid and partly for health reasons, he moved into rented accommodation. He intends to move into the property within weeks.
19. H's mortgage on his property ends in August 2024. He must arrange a replacement mortgage if he is to remain in the property. It has been valued at £2.3m (more than the £1.65m value in 2020) by his proposed lender, so that the net equity is now about £1.3m. If H invests the £250,000 currently held in the bank account, the mortgage will be £750,000 and the net equity will then be about £1.55m.
20. H first contacted W in September 2023 requesting agreement to his wish to remortgage the property and apply the £250,000 to reducing the mortgage liability. In November 2023, W said that she refused to consent, although no clear reason was given. In February 2024, she said she would consent but contingent on child arrangements and other unrelated matters.

### Conclusion

21. In respect of the remortgage, I unhesitatingly grant the application for the following reasons:

- a. Not to do so leaves H, and A, unable to live there even though it was bought to be their home. H cannot, I am satisfied, raise £1m from his own funds to clear the mortgage and he would therefore have to sell.
  - b. There is no detrimental financial impact on A. The proposed order fully secures her interests. One mortgage would be replaced with another for the same (or lesser) amount. It would avoid the upheaval of sale and purchase of another property.
  - c. The order, in my judgment, clearly envisages the possibility of remortgaging.
  - d. H has provided clear evidence that he is able to obtain a remortgage for the relevant amount.
  - e. In essence, H simply seeks to continue a satisfactory status quo in terms of housing.
22. In respect of the £250,000 it seems to me that it is reasonable for H to want to invest the monies in the property. It does not impact negatively upon A. The monies would be secured under the multiple protective terms of the order. It would reduce the overall level of borrowing to £750,000, and the mortgage repayments. It would enhance the stability of housing for H and A. The judgment anticipated that H would put the entire £900,000 in a property. In fact, he chose at the time to retain £250,000 in a bank account, but he cannot be criticised for now wanting to put in place what was always envisaged. The order itself states clearly that the monies can be invested in property or a bank account, and H in my judgment is entitled to elect to place the entirety of the monies in property. I bear in mind that W has done just that, and lives in a mortgage free property; it seems reasonable to me that H should be able to reduce the mortgage without in any way jeopardising the monies.
23. The points made by W did not seem to me to justify refusal of the application. She was concerned about the funding of future costs for A, but that is not a matter for me; the application before me is strictly limited to a discrete part of implementing the final order of Roberts J. She raised a number of new matters which sought to reopen, or vary, what Roberts J had already determined. She raised issues of child arrangements. I felt that her mistrust of H coloured her response to what was essentially a straightforward, limited application brought by H.
24. W did raise one or two ancillary points which merit consideration but do not justify refusing the application. She was concerned that the proposed mortgage offer allows for interest to be rolled up over 3 years, at which point H would have to undertake a further remortgage. I did not think it sensible for interest to accrue in this way, not least because it would erode the equity in the property. However, H assured me that he will in fact meet the interest costs on a monthly basis, which meets the point. Separately, W told me that H is not paying the correct amount of child maintenance as it has not been uprated in accordance with CPI. This is not directly relevant to the application but needs to be sorted out. H told me that if he has been underpaying, he will make up the arrears. W also told me that H has not registered the relevant declaration of trust with HM Land Registry as provided for by the order of Roberts J; that, too, will need to be corrected and H agreed.
25. I therefore grant both aspects of the applications. In addition to the draft order provided to me, the following provisions shall be included:

- a. H will meet the mortgage interest on an ongoing basis
- b. H will send a copy of the relevant declaration of trust to the proposed lender. If the lender requests sight of the order of Roberts J, it can be redacted appropriately.
- c. H will send a copy of the relevant declaration of trust to HM Land Registry.
- d. For the avoidance of doubt, H will invest £250,000 in the property.

### Costs

26. H seeks an order for the costs of the application.
27. The first issue to determine is the applicable costs regime of this implementation application.
28. In my judgment, this liberty to apply application clearly falls within the category of “family proceedings”, and accordingly FPR2010 r28.2 applies. By that rule, Part 44 of the CPR 1998 applies to costs in family proceedings save for (so far as relevant to the matter before me) 44.2(2), namely that “the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party...”. In short, the starting point that costs follow the event is not applicable to the application before me.
29. I also take the view that FPR 2010 r28.3 does not apply to an application under the liberty to apply clause. Such an application is not “in relation to financial remedy proceedings”. Financial remedy proceedings are defined at 28.3(4)(b) and to my mind a liberty to apply application does not fit into any of the definitions therein. In particular, it is not a “financial order” which in turn is interpreted at FPR2010 r2.3. Thus, FPR 2010 r28.3(5) that the general rule “...is that the court will not make an order requiring one party to pay the costs of another party” does not apply to this application. In short, there is no starting point of no order as to costs.
30. It follows, in my judgment, that the invocation of the liberty to apply provision in respect of implementation in this case falls into the “clean sheet of paper” category where there is no formal starting point either way under the rules. The “clean sheet” applies to:
  - a. Financial orders which are, by FPR 2010 28.3 (4)(b)(i), expressly excepted from the No Order as to Costs starting point (maintenance pending suit, interim periodical payments, legal services payment orders and other interim orders);
  - b. Other applications which are not expressly exempted by FPR 2010 28.3 (4)(b) (i) but do not fall within either starting point. A number of such matters are helpfully summarised in the Costs section of at A Glance 32<sup>nd</sup> edition at page 101. To those, I would add Liberty to Apply as to implementation applications, made after the final order has been made and proceedings have concluded.
31. Accordingly, the court has a discretion which it is required to exercise by reference to the matters set out at CPR 1998 r44.2(4) and (5) which have not been disapplied in family proceedings by FPR 2010 r28.2.

32. That said, although there is no starting point, as Wilson LJ (as he then was) stated in **Baker v Rowe [2009] EWCA Civ 1162** at [25]:

“Even where the judge starts with a clean sheet, the fact that one party has been unsuccessful, and must therefore usually be regarded as responsible for the generation of the successful party’s costs, will often properly count as the decisive factor in the exercise of the judge’s discretion”.

33. Those words ring true in this case. H made an application. The relief sought was reasonable, and H has throughout made clear that all the protective measures in the order remain in place. W did not consent, and sought to introduce unrelated matters. Further, the costs of the abortive hearing on 11 April were caused by her failure to instruct lawyers until the last minute without any good reason for leaving it so late.

34. Additionally, H made an open proposal on 23 April 2024 inviting W to consent to the application on the basis of paying £20,000 towards his costs which at that time stood at £35,000. W has not responded substantively.

35. I consider that W must bear the costs of the application, including of the adjourned 11 April hearing. I do not consider that her stance has reached the threshold for an order for costs on the indemnity basis. On H’s own presentation, there was some room for uncertainty about the meaning of one relevant paragraph of the order, and it is of note that H originally elected not to put all the monies in the property and is now revisiting that earlier decision. Further, the offer to pay interest on an ongoing basis, rather than allowing it to be rolled up for the course of the mortgage term, only appeared during the hearing before me as a result of W’s concerns. Other points raised by W had some validity (e.g sending a copy of the relevant declaration of trust to HM Land Registry). But overall, I reject W’s assertion that she has been “strung along” and that H has sought to frustrate the order of Roberts J.

36. H’s claimed legal costs total £54,358 which seems to me to be a high figure, even allowing for the fact that there have been two hearings. Of that sum, £14,607 is applicable to the pre issue period which again seems high. Looking at the N260 in the round I propose to take the following course:

- a. To apply a 30% deduction to assume a notional standard assessment. That reduces the figure to £38,050.
- b. To order W to pay 2/3rds of that figure i.e £25,367.