Neutral Citation Number: [2018] EWHC 1214 (Fam)

Case No. FD18F00010

IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

IN THE MATTER OF AN APPLICATION UNDER PART III

OF THE MFPA 1984

AND IN THE MATTER OF AN APPLICATION FOR INTERIM MAINTENANCE

Royal Courts of Justice

Date: Thursday, 19 April 2018

Before:

MR JUSTICE HOLMAN

(sitting in public)

- - - - - - - - - - - - - - - -

B E T W E E N :

|  |  |  |
| --- | --- | --- |
|  | LKH | Applicant |
|  | - and  - |  |
|  | TQA AL Z | Respondent |

(Interim maintenance and costs funding)

- - - - - - - - - - - - - - - -

MRS R. CAREW POLE (instructed by Payne Hicks Beach) appeared on behalf of the applicant.

MR C. HALE QC (instructed by Vardags) appeared on behalf of the respondent.

- - - - - - - - - - - - - - - -

**J U D G M E N T (as approved by the judge)**

**WARNING: reporting restrictions may apply to the contents transcribed in this document, particularly if the case concerned a sexual offence or involved a child. Reporting restrictions prohibit the publication of the applicable information to the public or any section of the public, in writing, in a broadcast or by means of the internet, including social media. Anyone who receives a copy of this transcript is responsible in law for making sure that applicable restrictions are not breached. A person who breaches a reporting restriction is liable to a fine and/or imprisonment. For guidance on whether reporting restrictions apply, and to what information, ask at the court office or take legal advice.**

MR JUSTICE HOLMAN:

1. This is an application by a wife and mother for interim periodical payments in the context of proceedings under Part III of the 1984 Act after a foreign divorce. It is clear that the background context to this case and this application is one of very high expenditure indeed. Being a family of great wealth, or (if not the wealth of the husband personally) having access to great wealth, the parties have enmeshed themselves into litigation of the utmost intensity. That is illustrated by the figures that both sides respectively have given me today as to their past, and estimated future, costs.
2. Already the wife has incurred costs in relation to children disputes and this financial dispute of over £200,000, which she has not yet been able to pay to her solicitors. Additionally, and earlier, she incurred further costs of about £57,000 which she has paid. Her projected future costs are said to be about £155,750 in relation to children matters and about £91,730 in relation to financial matters. If all those figure are aggregated they total, in round figures, £500,000 on the wife's side alone. She, unlike the husband, has to pay VAT and accordingly an element within those costs is VAT at 20 per cent.
3. On the husband's side, he has incurred already about £35,000 in relation to financial matters, and about £98,000 in relation to children matters. Additionally, there were earlier costs of about £13,000 which he has paid in part. His future projected costs are about £80,000 in relation to financial matters and about £90,000 in relation to children matters. So his anticipated aggregate costs are of the order of £315,000 upon which he, being resident in Oman, does not have to pay VAT.
4. Between them, these parties are contemplating spending something of the order of £800,000 or more on their intense litigation. The level of the intensity is illustrated by the fact that, although he has not yet formally issued an application, the father has very recently indicated that he intends to seek an order from the court permitting the children to move to live with him in Oman, which the mother will no doubt very strongly resist.
5. These are not the sorts of figures that ordinary people of modest means even begin to contemplate. Both parties have instructed some of the most prestigious firms of solicitors in central London, who in turn have instructed top rank counsel. It is, to my mind, some indication of the scale of expenditure and living in the past that they chose to litigate at this sort of rate. That apart, Mrs Rebecca Carew Pole, who appears today on behalf of the wife and mother, has demonstrated in her note for today's hearing dated 17 April 2018 that the parties have been historically living at a very high rate indeed. She estimates in paragraph 19 of that note that the historic annual income of the husband has been of the order of about £3.7 million per annum, and that the wife alone had been spending at a rate of the order of £100,000 per calendar month.

1. That is the context. There is no Form E from the husband. He has chosen not to attend here today. Only limited time is available, and I can only make the most summary of orders on a somewhat impressionistic basis.
2. There has been much discussion today about payments which the husband does claim currently to make, and a proposal that he should give formal undertakings reflecting paragraphs (a) to (h) of paragraph 8 of his statement dated 16 April 2018, which is reproduced at paragraph 12 of Mr Charles Hale QC's position statement dated 19 April 2018 for today.
3. It is sufficient for me to say that there is agreement, subject to precise drafting, that the husband will give undertakings, which will be recited as the basis of the order, in the terms of paragraphs (a), (c), (d), (e), (f) and (h) of his paragraph 8 and Mr Hale's paragraph 12. There has been great controversy around his paragraphs (b) and (g); (b) pertains to "leasing vehicles, paying drivers[sic] and insurance costs of £8,800 per month".
4. There is no dispute or issue that the husband should continue, pursuant to an undertaking, to pay the leasing charges of the existing vehicles and the insurance and similar running costs. The issue in relation to payment of the driver (I understand there is in fact only one) relates to direction and control. The wife complains that, because it is the husband who pays the salary of the driver, the husband instructs the driver that he is not to drive the wife anywhere alone in the car, unless she has the children with her and so it is a journey for the purpose and benefit of the children. This, frankly, is highly controlling, and in my view demeaning of the status of a recently divorced wife and mother of the children. It is, frankly, absurd if the cars are available and the proposed journey is within the contracted hours of work of the driver, that the wife and mother should not herself be able to undertake some reasonable journey driven by the driver. This, of course, has been the historical pattern in this family. They do not drive themselves.
5. After Mr Hale had spoken during the course of today with his client in Oman, it began to emerge that part of the issue relates to a tendency of the wife to smoke or vape in the cars in the presence of the drivers if the children are not there. I suggested that perhaps there could be a cross-undertaking by the wife that she would not smoke or vape in the car, so as to protect the driver from the effects of smoke. This was immediately retorted by my being told that the husband is himself in the habit of smoking when driven by the driver, and so it is, of course, unfair and unequal if she should be bound by some such undertaking when he is not. I narrate all this because it illustrates the objectively petty position that this family and these parties have got themselves into.
6. Mr Hale then took further instructions from his client, and I was told that the husband would agree to the driver driving the wife on her own for "reasonable" journeys and “provided they did not take priority over” the children. It is with the wife in her capacity as mother that the children are currently living. She is, as a matter of fact, in control of their daily lives, and it is, frankly, preposterous to suggest that there should be some provision to the effect that she can only be driven alone in the car provided it does not take priority over the children. It is for her to make decisions as to the division of the driver's time between her reasonable needs and the reasonable needs of the children.
7. For all these reasons, which I regret having to elaborate at such length, I have decided, so far as the issue of the vehicles is concerned, that there must be an undertaking by the husband that he will continue punctually to pay all the leasing charges on the vehicles and the insurance and other running costs, but from now onwards he is not required to pay the salary or other employment costs of the driver. These must be paid by the wife directly to the driver, but there must be added to the figures for interim maintenance (which I will later announce) an amount equal to the annual salary and other employment costs of the driver, divided by 12 and so reduced to a monthly figure. Today, no one in the court room knows what the salary of the driver is, but it must be ascertained and the final figure for interim maintenance adjusted in that way.
8. I turn from that issue to item (g) which is headed "The children's daily living and reasonable *ad hoc* expenses". That is an inherently vague phrase. It essentially relates to what appears in the current bundle at page C109, which is Schedule 10 to the wife's Form E and headed "Other expenses specific to children". It is important not to double count. and Schedule 10 and page C109 includes a number of items under the heading "School", most notably school fees, and also includes a reference under the heading "Other" to "nanny/child miner". Separate provision is made by the undertakings which the husband offers, and the wife accepts, for direct payment of all the children's school fees and other school expenses, and also of the wages or salaries of the nannies and governess whom this family employ, so patently those items must be extracted from the figures in Schedule 10 and pages 109 and 110.
9. After those items are extracted, the total amount claimed as future estimated expenditure specifically on the children is about £20,544 per month. That is not far short of £250,000 a year. Mr Hale has strenuously submitted that these sorts of items, which include the children's clothing, shoes, medical expenses, toys, birthday parties, holidays, extra lessons on dancing, music, riding, et cetera, should be the subject of some generalised undertaking by the husband that he will pay all reasonable expenses of the children, either in advance or promptly on production of a receipt or bill.
10. Mrs Carew Pole says that such an approach is pregnant with problems for the wife, and that she would far rather that she personally assumed responsibility for all this expenditure out of a regular monthly amount received by her. That remains the position of, and on behalf of, the wife even after I had indicated that, for the purposes of interim periodical payments, I intended very considerably to reduce or cut down the claimed figure of £20,544 per month. However, I am prepared to accede to the argument and submission by, and on behalf of, the wife, that continued reliance on the reliability of the husband to pay as and when required is fraught with danger for her.
11. Linked with Schedule 10 to the Form E (now at bundle page 109) is Schedule 4 to the wife's statement dated 8 February 2018 and now at bundle page 63. This is headed "Other expenses specific to children" and the narrative is:

"Children's expenses not already covered by the respondent, such as weekend excursions and activities, taxis, eating out, and gifts for friends …"

for which a further £2,000 per month is claimed.

1. On the face of it, there is at least some overlap between Schedule 4 to the statement at bundle page C63 and Schedule 10 to the Form E at bundle page 109; but Mrs Carew Pole remained adamant that Schedule 4 at page 63 is, indeed, separate from, and additional to, all the items and figures in Schedule 10 at page 109, so the claimed amount, aggregating those two schedules, is £22,544. In my view this is excessive, at any rate on an interim basis even having regard to the general standard of living of this family. There are two children aged 11 and 8. It is indeed hard to imagine that children of that age really need £270,000 per annum for their general incidental expenditure. Under this head, that is, combining Schedule 10 on page 109 and Schedule 4 on page 63, I propose to allow a total of £12,000 per month.
2. The next item that is claimed is a heading in Schedule 3 to the wife's February statement, now at bundle page C62 headed "Miscellaneous". This comprises two items. One is "Any loan repayment (Barclays loan)" at the rate of £874.20 per month. That is said to be the contractual amount that the wife is currently required to pay Barclays Bank by way of repayment of a loan totalling £40,000. It seems to me inescapable that she should be funded to make that repayment. The other item is "Contributions to dependants (maintenance of Beirut property)" and a claimed amount of £3,750 per month. This is a somewhat grey area, but the wife originates from the Lebanon. I am told that these are payments that she does have to make referable to properties in which she has an interest in Beirut, and which historically the husband has paid. It seems to me that, on an interim basis, she does require to be funded to continue to make those payments. So specifically in relation to Schedule 3 on page 62 I propose to allow, not quite the full amount claimed, but £4,000 per month.
3. That leaves her own personal expenditure, which is set out in Schedule 2 to her February statement, now at bundle page 61. This claims a total amount of £16,182 per month for her own personal expenditure on such matters as hair dressing, medical expenses, an array of therapists, beauty and orthodontic treatment, and other incidental expenditure, and shoes and clothes. I do not intend to comment on any of the individual items but, again, it seems to me that on an interim basis that is an unnecessarily high figure, and I propose to allow under this heading £10,000 per month.
4. The upshot is, so far as general maintenance for herself and the children are concerned, that the husband must pay the aggregate of £12,000 plus £4,000 plus £10,000 per month, which is £26,000 per month, plus, once it has been ascertained, the averaged monthly aggregate of the salary and all other employment expenses of the driver. That should be capable of being ascertained overnight and, accordingly, when counsel have drafted an order and lodged it (probably now next week) it should be possible to insert the correct calculated figure. That deals with general maintenance.
5. I now turn to some quite separate elements of the wife's claim. She says that she has already incurred very considerable debts amounting to several hundreds of thousands of pounds. One of these, a relatively small one, is the debt to Barclays which she is contractually obliged to repay and for which I have made provision in the above order.
6. Mrs Carew Pole submits that there should be an additional provision in the order for maintenance of £40,000 per calendar month in order to enable the wife to repay the debts that she has already incurred. Apart from the debt to Barclays and any debt to her lawyers (to which I will refer below), these are not debts which she is contractually bound to repay at the present moment nor, apparently, are they very pressing ones. Maintenance is primarily designed to cover current and future liabilities. In my view, if I were to make any provision in the present order for substantial monthly sums referable to past and existing debts, I would be impermissibly making a form of capital provision disguised as maintenance. I am not willing to do that. I stress, however, that the whole question of her debts will, of course, fall to be considered as part of her overall financial claim and whatever distributive capital order is made.
7. Finally, there are claims in relation to legal funding. As I have already mentioned, the wife already owes her solicitors, Payne Hicks Beach, a sum in excess of £200,000. It is submitted that I should make provision for her to start paying off that indebtedness at the rate of £30,000 a month. I am not willing to do so. This is not a case to which section 22ZA of the Matrimonial Causes Act 1973 (as amended) applies, but if this was an English matrimonial suit the starting point of that section, by virtue of sub section (1), is that the court may make an order requiring one party to pay to the other "an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings". That, as it seems to me, is looking forward to the obtaining of legal services, not backwards to legal services which have already been obtained.
8. My attention has been drawn also to the authority of Mostyn J. in *Rubin v Rubin* [2014] EWHC 611 (Fam), [2014] 2FLR 1018. In that judgment at paragraph 13 he attempted to summarise various principles, and at principle (iv) he said:

"… the exercise essentially looks to the future. It is important that the jurisdiction is not used to outflank or supplant the powers and principles governing an award of costs … It is not a surrogate *inter partes* costs jurisdiction. Thus a LSPO should only be awarded to cover historic unpaid costs where the court is satisfied that without such a payment the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings."

1. At paragraph 16 of the same judgment Mostyn J. declined to make an LSPO order in that case. In relation to past costs he said, on the facts of that case:

"This is not a case where her lawyers are saying that they will down tools unless they are paid outstanding costs as well as being funded for the future. Were her application to be granted it would represent a very dangerous subversion of the exclusivity of the *inter partes* costs powers and principles … Such a development must be stopped in its tracks."

1. At this hour, 17.30, of this day, this is not the occasion for me to add to, or consider in any detail, the jurisprudenceon this topic. Mr Hale has very properly told me that he is aware of a decision of Cobb J. in which that judge was willing in certain circumstances to make an order to cover historic costs, so I do not say it is not in any circumstances possible; but I do agree with Mostyn J. in *Rubin* that it should only be done very sparingly indeed
2. The fact of the matter is that in this family law field prestigious firms of solicitors, practising here in central London, do very frequently make a decision to allow an element of credit to their clients on the assessment by them that the client will ultimately be in a position to pay the bill. Indeed, in this present case the prestigious solicitors who act for the husband, namely Vardags, have, as I have already said, themselves allowed considerable credit to their client.
3. Mrs Carew Pole submitted that if Payne Hicks Beach are not relatively swiftly paid all their outstanding costs they would not continue to act for this client, even if there is an appropriate award of monthly payments to cover future costs. With the utmost respect to Mrs Carew Pole, I cannot accept that as a matter of submission. If a partner of Payne Hicks Beach had made a clear and unequivocal witness statement, to be publicly relied upon, to the effect that they would now, to quote Mostyn J. "down tools" or, to use another metaphor, pull the plug on their client unless the past costs are rapidly paid, even if the future costs are provided for, then I would have to consider that. But it would in my view be a regrettable and regressive development in this class of expensive family litigation. I am not prepared to assume, on the basis of a submission, that this very distinguished firm would act in that way.
4. So, on the facts and in the circumstances of this case, I am not willing to make any order at all in relation to the costs that the wife has already incurred. I stress, of course, that I do not in any way whatsoever preclude that the amount of those costs should not later be the subject, either of a costs order, or of capital provision to be made by the husband at the substantive hearing. But for the time being, the solicitors, having made a decision to extend that credit, must, I am afraid, live with it.
5. Future costs, however, is a very different matter. This wife already owes her solicitors over £200,000. Quite frankly, there is absolutely no reason whatsoever to suppose or presume that they would be willing to allow such great credit to be increased yet further.
6. In her statement in support of this application the wife has said, and explained, that she has been unable to obtain a litigation loan from any source and that her solicitors are not willing to enter into some kind of Sears Tooth charge.
7. In my view, equality of arms, and justice to this wife, clearly requires that provision is now made for her escalating costs from now on in.
8. The estimated costs starting today in relation to the children proceedings are £155,760. The estimated cost starting today in relation to financial proceedings are, in round figures, £92,000. Those figures total (in round figures) £247,000 inclusive of VAT. These are of course eye watering figures, but they are proportionate to the sort of costs that the husband/father himself is envisaging incurring with his own prestigious and expensive solicitors, Vardags.
9. It seems to me that it would be grossly unjust to this wife, and very contrary to the interests of these children, if he was able to litigate with great intensity with one of the most prestigious firms of solicitors in London and highly experienced leading counsel, and the wife and mother was left to fend for herself by self-representing.
10. For those reasons, I will make legal funding provision by way of maintenance which I calculate as £250,000 to be averaged out over the next six months, making just over £40,000 per month. So in addition to the general maintenance to which I have already referred, there must also be a specific monthly payment by the husband of £40,000. That element of the maintenance must be paid directly to the wife's solicitors (Payne Hicks Beach), and Payne Hicks Beach must, of course, keep the money safely in their client account save to the extent that they need to disburse it or pay their fees starting from tomorrow. There must be a suitable formula in the order to the effect that (consistent with privilege) Payne Hicks Beach must regularly account to the husband as to how the money is being spent, and if, at the end of all these hearings there is any surplus, it must be credited straight back to the husband. I stress that the £40,000 per month is, as I have explained, intended to cover future costs of the wife. Payne Hicks Beach cannot apply any part of it in satisfying the amounts that she owes her up to the conclusion of today.
11. For those reasons, and noting that the time is now 17.45, that will be my ruling.

**LATER**

MR JUSTICE HOLMAN

1. I think she should have her costs on the basis that she has achieved considerable success. It is not a reason for not awarding costs that somebody gets less than they asked for. You had not made an offer. She has got a great deal more than was, on any possible view, on the table at the outset today, so I am going to make an order that the husband must pay the costs of the wife of and incidental to the application for interim periodical payments, summarily assessed in the sum of £12,870 inclusive of all VAT.
2. The amount of – is it £7,000?

MR HALE: £7,500.

1. The amount of £7,500 ordered by Mr Justice [X] to be paid by the wife to the husband by the order of [blank date] is to be set off and credited against the said sum. Accordingly, the husband must pay the wife the sum of £5,370 within 14 days of today and the obligation of the wife to pay him £7,500 pursuant to the order of [blank] date is hereby satisfied; or words, at any rate, to that effect.

|  |
| --- |
| **CERTIFICATE**  Opus 2 International Ltd. hereby certifies that the above is an accurate and complete record of the proceedings or part thereof.  *Transcribed by* ***Opus 2 International Ltd.***  ***(Incorporating Beverley F. Nunnery & Co.)***  *Official Court Reporters and Audio Transcribers*  ***5 New Street Square, London EC4A 3BF Tel: 020 7831 5627 Fax: 020 7831 7737***  ***civil@opus2.digital***  This transcript is subject to Judge’s approval |

\_\_\_\_\_\_\_\_\_