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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
ON APPEAL FROM THE
CENTRAL FAMILY COURT



No. FA-2023-000166; FD10D00558

[2023] EWHC 2958 (Fam)

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 10 November 2023

IN THE MATTER OF THE MATRIMONIAL CAUSES ACT 1973

Before:

SIR JONATHAN COHEN

(Sitting as a Judge of the High Court)

(In Public)

B E T W E E N :

TK

Appellant

- and -

AC

Respondent

MS F STEWART (by Direct Access) appeared on behalf of the Applicant.

THE RESPONDENT appeared In Person.

J U D G M E N T

SIR JONATHAN COHEN:

- 1 This is an appeal by TK (the husband) against paras.5 and 6 of an order of Recorder Tidbury, made on 14 April 2023. By his order the Recorder directed the husband (as I shall call him) to pay to the wife (as I shall call her) AC, the sum of £1,010 per calendar month backdated to 16 March 2023 until 30 September 2023, and with effect from 1 October 2023, the increased sum of £3,510 per month until the determination of her application for a financial order or other events as set out in the order.
- 2 In addition, he required the payment of a legal services order in the sum of £4,000 per calendar month for four months which was to take the provision up to the first appointment which was listed for 22 June 2023.
- 3 It is right to record that on 22 June the matter was further adjourned.
- 4 The parties are, as I have mentioned called by me “the husband” and “the wife”, but it could hardly be less apt as a description in this case, bearing in mind the history which I will come on to in just a moment.
- 5 The application for permission to appeal came before Moor J and on 25 August 2023 he granted permission to the husband to appeal the first of his three grounds.
 - Ground 1: the ground on which permission was granted, related to whether an order should be made in circumstances where the payer has no assets and no income and is very heavily indebted, so that any payment made would be from borrowed funds which would add to an already unsustainable level of debt. In relation to that, Moor J said that that ground “has a real prospect of success and that in any event, it is right for the court to hear argument as to the correct approach to funding interim orders from debt.”
 - Ground 2: related to the wife’s own financial resources; and
 - Ground 3: related to whether or not there was any merit in the wife’s application in circumstances where she sought an extension of a periodical payments order arising 15 years after the end of their eight-week marital relationship.
- 6 In relation to those two matters, Moor J said that they were for the final hearing.
- 7 Before me the husband has been represented by Ms Fiona Stewart as a direct access counsel. The wife has not been represented, having parted company with her solicitors at some stage after the hearing before Recorder Tidbury.
- 8 I now say something about the factual background. The husband is aged 50 and the wife is aged 48. In 2003 they started what has been described as an “on/off period of cohabitation” and by that relationship they had two children: a boy who is at university and is aged 19; and a girl who is 16 and has just started on her A level studies.
- 9 The parties married after the birth of their younger child in August 2008 and separated two months later. Thus it is that they have been apart now for 15 years. They divorced in 2012 and a final ancillary relief hearing – as then described – took place in February 2013.

- 10 The finding of the court, as I understand it, was that the husband was then substantially indebted to the tune of about £600,000. A small capital award of £42,000 was made, but a substantive order for periodical payments was made for a 10-year term in the sum of £4,000 per month to the wife and £1,000 per month for each child, all index linked.
- 11 By the time one gets to February 2023, 10 years after the order was made and was about to expire, the sum the husband was paying was about £5,900 per month comprising £1300 per month to the daughter and £4,600 per month to the wife. The order for the son had lapsed as although he divides his time between his parents, his main home was then with his father and remains so when he is not at university.
- 12 Life for the parties has not gone smoothly. The wife has had one very harmful subsequent relationship, and she now is on her own with the parties' daughter. The husband has re-married, and he has three young children by his second wife. She comes from a relatively prosperous background. Within his business life the husband and a colleague set up a financial services business specialising in mergers and acquisitions. It has had a rough few years. It ceased paying salaries some time ago and instead, when deals are executed, the company received substantial payments. I think the maximum was £1.2m. Thus it is that his receipts are very lumpy. There have been no receipts since January 2023.
- 13 The wife, who had a good job in an administrative capacity, left that job and she now works part time for a supermarket.
- 14 In terms of housing, the position is this: the husband and his second wife bought their own replacement home and they lived there until early 2022. They then had to sell the home to avoid bankruptcy, and he says that the net proceeds of around £700,000 were used to pay off some of his debts. The wife says that she has seen no proof of that, but that is not a matter for me to go into at this hearing. Thus it is that he now lives in rented accommodation.
- 15 The wife lived in rented accommodation. By the time of the order under appeal she had paid for one year's rental in advance, which period expired in October 2023. She was then going to be liable to pay £2,500 per month by way of rent, which explains the increase in the maintenance payments in that sum as set out at para.5 of the Recorder's order. However, as the new term of the lease became due, the wife felt unable to commit to pay the new rent from the resources she then had, and vacated. She and their daughter are now sofa surfing with friends and spending some nights in hotels.
- 16 The husband's indebtedness has risen and risen. The Recorder found it to be now in the sum of about £1.7m, comprising broadly:
- (i) about £500,000 due to HMRC, a debt which has existed but grown since the time that the parties were first before the court;
 - (ii) he has credit card debts of about £150,000;
 - (iii) other commercial debts of £125,000 or so;
 - (iv) a director's loan account debt of about £625,000 which, if not repaid, will lead to a further tax liability; and
 - (v) debts to various friends and family of now about £300,000.

- 17 It can thus be seen that these are to a significant extent, debts which will not go away and have to be addressed – some sooner, some later.
- 18 This is not a hidden assets case. The Recorder calculated the husband’s net income as averaging about £200,000 to £250,000, and that roughly equalled the cost of servicing and repaying the HMRC and commercial loans. HMRC require repayment within three years.
- 19 But the fact is, he says, and it has not been challenged, that he has received no income since January 2023, and he tells me that there is none visible in the pipeline. Thus, if his income were to be as the Recorder calculated, then payment of his commercial liabilities would swallow it all; and if income does not arrive then his situation becomes even more dire.
- 20 The issue as put before me by Ms Stewart is whether it was wrong as a matter of principle to order periodical payments which can only be paid by increasing debt. There is no doubt that the husband is living substantially beyond his means. In summer 2022 on the sale of his home he and his wife rented a property at £8,000 per month. His three children by his second marriage are in private education. There are aspects of his budget which certainly strike me as extravagant, including payments for holidays which are put at £2,500 a month although he says that that is not something that is actually being spent.
- 21 But the lease of his property is for three years, and the husband is contractually bound to pay it and his children are, for better or for worse, in private education. He says with force, “How was I to know that 15 years after separation and 10 years after the order was made my first wife was going to come back for more?” I regard that as a powerful point and certainly a shield against at least some of the allegations of extravagance.
- 22 I do not agree with Ms Stewart’s broad point, that it is necessarily wrong in principle to order maintenance to be paid out of debt. There are, in my judgment, cases where it may be appropriate. The following non-exclusive list immediately spring to mind:
- (i) cases where the history establishes that the debt is unlikely to be called in;
 - (ii) cases where debt is likely to be met by a third party. I think of a trust, a generous parent, or whatever;
 - (iii) cases where it is foreseeable that money will be coming, whether by sale of property, inheritance or gift, or by some successful business venture.
- 23 In these – and no doubt other cases – an order for payment of maintenance to be made out of debt can, if the circumstances make it appropriate, be justified. In my view this is not such a case. Payment by the husband in this case would or could only be made by driving the husband further into debt. In this case there is no crock of gold visible at the end of the rainbow; and there is something in the point that the husband makes that since January the only person who has received income in this case, albeit at the rate of some £3,250 per month is the wife, because it is not him.
- 24 Both parties’ financial positions are dire. The wife receives £1300 per month from the husband for their daughter and there is no application to vary that, quite rightly. She receives wages of about £1300 a month and state benefits in a fluctuating sum found by the Recorder to be around £650 a month – but currently a little lower, the wife says, whilst an adjustment is being made – albeit that is to some extent counterbalanced by some funds that she is receiving for a second job that she is doing short-term. So, unsurprisingly, her income is fully consumed.

- 25 In terms of capital she has, as a result of the husband's belated compliance with the terms of Moor J's order to pay the arrears of maintenance as found to be due by the Recorder, about £15,000 in the bank. But she is being pursued by her former solicitors for about the same amount of money. She and they parted company some time after the April hearing, explaining why she is self-representing at this hearing. It is a matter for her, but she would be well advised to seek to negotiate with her solicitors to retain sufficient funds to instruct a direct access barrister for the FDR coming up in just over a fortnight and for any final hearing.
- 26 The husband has only indebtedness and no assets. He instructs a direct access barrister. She has not been paid for this hearing and I am grateful for her attendance in the circumstances; so, neither party has a solicitor at the moment.
- 27 For all the husband's appearance of financial stability, he is digging himself further and further into a hole.
- 28 I give great weight to the Recorder's judgment. He is very experienced, and it is a very careful judgment and a testament to his endeavour in the light of the hearing which was plainly badly under time-estimated. His judgment is long and thoughtful.
- 29 It is plain to me that now that there are no solicitors involved, I must discharge the legal services order. My view that this part of the order is no longer appropriate has not been put in issue.
- 30 The wife has no home, and the arithmetic on which the Recorder made his increased order with effect from October is now no longer relevant.
- 31 The wife has approached the council for housing but currently is faced with the argument that she voluntarily gave up her own privately rented accommodation. That is really a far from adequate description of what happened, but that is not a matter for me.
- 32 So, I am left pondering over the future of the payment of the order for £1,010 a month. The wife's needs are obvious, and I have great sympathy with her. But I cannot see how it can be right to make a maintenance order in these circumstances:
1. where there is no source of funds that can be identified;
 2. as I am told and has not been contradicted, the director's loan account cannot be extended;
 3. there is no commercial lender who has been identified;
 4. I am not told that there is any generous soul prepared to advance money in circumstances where no security can be offered and when there is no obligation; and
 5. therefore all I would be doing if I left the order in place is increasing the huge indebtedness that is already there, on a wing and a prayer that someone might come up with some money.

I therefore have to allow the appeal and discharge paragraphs 5 and 6 of the Recorder's order.

- 33 I want to end up by saying this – there are many important points that arise for discussion, in particular whether the wife should be entitled in the circumstances that exist to come back for more as a result of what had happened to her in the years after the marital partnership concluded. But these are not matters for me today, and I do not venture any opinion on them.
- 34 I therefore allow the appeal and I set aside paras.5 and 6 of the order of 14 April.