

## In Practice

### Schedule I Children Act 1989: Who Pays the Costs?

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We have all been there – a wealthy father, a mother with no resources and the children living with mother as a result of the breakdown of the relationship. How is the mother supposed to afford the costs of mounting an application to secure provision for the children? It is surprising, when around 44% of the children born in England and Wales each year are born to unmarried parents, that there are still relatively few reported decisions in respect of of Sch 1 Children Act 1989 claims. The potential problems and associated costs of pursuing a Sch 1 claim can be high. Those problems and costs are likely to be greatly increased where the father has, for example, complex business interests, assets offshore and where there is not a readily discernable flow of capital and/or income that can easily be identified to meet the claim for the acquisition of a property, periodical payments or a lump sum and/or to meet the mother's application for an award in respect of legal fees.

A vital and fundamental requirement for the impecunious mother is to secure a means by which she is able to finance the costs of the application for Sch 1 relief. The most obvious route is to secure those monies from the father. Do the provisions of Sch 1 of the 1989 Act enable the court to make the provisions for a 'fighting fund' for the mother?

## **THE LAW**

Schedule 1 to the Children Act 1989, which re-enacted the provisions of The Family Law Reform Act 1987, provides for the court to make financial provision for the children and the range of the court's powers include the making of:

- (1) Periodical payments orders.
- (2) Secured periodical payments order.
- (3) Lump sum orders.
- (4) Settlement of property.
- (5) Transfer of property orders.

When considering making an order, the court has to have regard to all the circumstances including:

- (a) the income, earning capacity, property and other financial resources which each person mentioned in sub-para (3) has or is likely to have in the foreseeable future;
- (b) the financial needs, obligations and responsibilities which each person mentioned in sub-para (3) has or is likely to have in the foreseeable future;
- (c) the financial needs of the child;

- (d) the income, earning capacity (if any), property and other financial resources of the child;
- (e) any physical or mental disability of the child;
- (f) the manner in which the child was being, or was expected to be, educated or trained [CA 1989, Sch 1 para. 4 (1)].

It must also be remembered that in exercising its powers the court can make orders against persons who are not the mother or the father of the child. In deciding whether to exercise powers against such a person the court shall, in addition have regard to:

- (a) Whether that person had assumed responsibility for maintenance for the child and, if so, the extent to which and basis on which he assumed that responsibility and the length of the period during which he met that responsibility.
- (b) Whether he did so knowing that the child was not his child.
- (c) The liability of any other persons to maintain the child.

The landmark case in respect of claims under Sch 1 of the 1989 Act is *Re P (Child: Financial Provision)* [2003] 2 FLR 865. This case, however, does not give guidance on the award of legal costs on an interim basis to assist (usually) a mother in the pursuit of an application. *Re P* established the principle of determining a child's maintenance requirements not solely on the basis of strict budgetary requirements but including an element to represent a carer's allowance.

## PROVISION FOR LEGAL COSTS

Can an interim award of periodical payments include provision for legal costs? (Note the phrase 'periodical payments' must be read in conjunction with the restrictions on the power of the court to make 'a maintenance order' applied by the Child Support Act 1991 ss 8 (3) and (11). There plainly is jurisdiction for a court for a court to make an award for legal costs. The power to make such an award is not, however, uncontroversial. In *W v J (Child: Variation of Financial Provisions)* [2004] 2 FLR 300, Bennett J concluded that on its true construction Children Act 1989, Sch 1, did not give the court jurisdiction to make an interim payment in respect of legal costs to a parent. He said:

'In my judgment [counsel for the father] is correct in her submission that

a parent seeking the upfront payment of his or her legal fees against the

other parent is seeking a benefit for him/herself and not for the child.

The purpose of such an application would vary from case to case. It may

be to relieve the applicant parent from borrowing such monies from a

bank or other financial institution. It may relieve the applicant parent

from having to go to friends or family to lend him or her such monies

to pay his/her legal bills. It may be to relieve the applicant parent of

having to apply for assistance from the Legal Services Commission.

These are examples of how, in my judgment, such an application, as

mounted by the mother in this case, can be seen to be for the applicant

parent's benefit rather than the child's. In the instant case the mother

makes her application to relieve her own (alleged) impecuniosity. If

the application is granted in whole or in part, the benefit of the transfer

of monies from the father to the mother inures to the mother's benefit.

None of it goes to T, nor is anything acquired with it which benefits T.

(By way of contrast, the same cannot be said in relation to a housing

fund, money for clothes for T or school fees). The money is spent on

the mother's lawyers, who advance her case as to what she perceives

to be in T's interests. The insistence by Mr Howard that the application

before me is for the benefit of the child is, in my judgment a forensic

disguise of the mother's need for money to pay her legal expenses.

Thus, in my judgement, the court has no jurisdiction under Sch. 1.

Neither do I believe that there is such jurisdiction under the inherent

Jurisdiction ...

Further if I am right that Parliament in Sch 1 does not confer the

Necessary jurisdiction on the court to make the order sought by the

mother in application before me, in my judgment it would be a misuse

of ward ship powers to invoke such a power...' (paras [-[48]

A year later the Court of Appeal in *Re S*(Child: Financial provision) [2005]2 FLR 94 sought to put Bennett J's decision in *W v J* in its proper context. Thorpe LJ observed that:

[The statements of Bennett J] are unimpeachable in such extreme case. The application before him was an application for the increase of the father's obligation from an annual sum of £32,400 to an annual sum of £178,400, since the mother sought the court's validation of her intention to spend £146,000 with her solicitors over a 9-month period between July 2003 and March 2004. No wonder that such an application attracted Bennett J's conclusion that it was all designed to benefit the mother's taste for litigation and was not for the benefit of her child.

I do not read his observations in paras [46] and [47] as going much, if any, beyond the facts of the case then before him. (para [20])

Wall LJ agreed Thorpe LJ and commented that as a matter of principle he saw no reason why a parent in a child abduction case, who sought an order against assets held by the other

party in this jurisdiction should not be granted an order pursuant to the provisions of Sch 1 which would be designed to benefit the child by facilitating a prompt return to that parent's case and to this jurisdiction (para[29]. He later said:

...it seems to me that, as an exercise of discretion, of *W v J*... is manifestly correctly decided on its facts, which are, on any view, extreme and far removed from the facts of this case. I likewise agree with Thorpe LJ that I do not think Bennett J was seeking to lay down any general principle; nor I think, is our decision intended to encourage applications Under Sch 1 to fund continuing and expensive litigation for residence or contact orders between warring parties' (para [31])

The decision for the Court of Appeal in *Re S* established the following:

- (a) The decision in *W v J* is restricted to its own facts and does not lay down any general principles;
- (b) The court did not wish to open the floodgates to applications for legal costs under Sch 1; but
- (c) Importantly, it establishes the principle that a claim for an order for legal costs may properly be made, as a

matter of statutory construction, under Sch 1 if the claim is designed (ultimately) to be for the benefit of the child.

In *MT v T* [2007] 2 FLR 925 Charles J. Concluded that the correct interpretation of the provisions of Sch 1 was that it included the ability of the court to order, by way of interim payment, a payment towards legal costs. He held that:

- (a) He was not bound by the decision in *W v J*; and
- (b) The applicant parent was bringing the application for an order for the payment of legal costs for the benefit of the child.

He considered the meaning of the phrase for the ‘benefit of the child’ and noted that the use of the word ‘benefit’ within that schedule should be given a wide meaning. The word ‘benefit’ is an ordinary English word and, therefore, just as in the cases of *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1FLR 377 AND *G v G (Maintenance Pending Suit: Costs)* [2003] 2 FLR 71, the approach to construction is to apply and construe the range of meaning of the ordinary English word in its context. The word ‘benefit’ can also be described as a chameleon word and therefore one that takes ‘colour from its context’ (para [17]). Charles J went on then to consider the context of the word ‘benefit’, in Sch 1 he concluded:

‘It provides that an applicant, usually a parent, can bring an application for the benefit of the child. You stand back and ask how the applicant holds money

ordered under Sch 1. The answer is that those moneys, to adopt an analogy, would be held for a purpose and possibly on a purpose trust. It seems to me that an overview of Sch 1 shows that the applicant is applying in a representative capacity. I do not use that expression in a technical sense, but the applicant is applying to obtain an order for the benefit of the child or children and therefore somebody else. I confess, therefore, that I simply do not agree with the conclusion reached by Bennett J, if that is its true effect, that, as a matter of construction of Sch 1, legal costs are excluded as a matter of jurisdiction because they are for the benefit of the applicant personally and not for the benefit of the child. I would respectfully agree with the proposition that in the exercise of the discretion – if, as I believe to be the case, there be such a discretion – care needs to be taken to see that the moneys are not being spent to satisfy the applicant's taste for litigation. But that is a matter relating to the exercise of discretion rather than jurisdiction. To my mind, if you stand back and ask yourself, given my conclusion that the applicant is in a representative or quasi-representative capacity: 'would a payment in respect of the costs to be incurred by the applicant in bringing the case effectively on behalf of the children be a payment for the benefit of the children?' the answer, to my mind, is yes. Having that jurisdiction

does not mean that it will always be exercised.’ (para [18])

On the 8<sup>th</sup> of April 2009 a decision was given in *G v G* [2009] EWHC 2080 (Fam), [2009] 2FLR (forthcoming) by Mr Justice Moylan. The parties had three children aged 10, 9 and 7 and the mother applied for an interim periodical payments order to include legal costs. The father argued that the court did not have jurisdiction to include legal fees, relying on the decision in *W v J* and *Re S* contending that they applied only to legal proceedings in a foreign jurisdiction. The court held there was no justification for seeking to distinguish between legal proceedings in a foreign jurisdiction and legal proceedings in this jurisdiction. The mother was awarded £40,000.

The combination of the decision in *Re S*, *MT v T* and *G v G* establish the clear principle that an interim order for the payment of the applicant’s costs, for the benefit of the child, may be sought in an application under Sch 1.

### **HOW ARE THE INTERIM COSTS PAID; LUMP SUM?**

When acting for a mother there is often a need for speed in the instigation of an application for interim costs given that costs will often accrue rapidly. Frequently the practitioner acting for the paying party (usually the father) receives the early request made on behalf of the applicant for a payment of £50,000 up front and £2,500 per month thereafter. Is that a legitimate request? There is no jurisdiction to make an order for an interim lump sum under

the 1989 Act. Schedule 1, para 9 of the Act provides for the interim orders which the court can make and makes no reference to the payment of the interim lump sums. There is no authority to support the proposition that interim lump sum orders may be made (and the court has no such power under the Matrimonial Causes Act 1973 in divorce cases). Schedule 1, para 9 provides:

- (1) Where an application is made under paragraph 1 or 2 the court may, at any time before it disposes of the application, make an interim order:
  - (a) Requiring either or both parents to make such periodical payments, at such times and for such term as the court thinks fit, and
  - (b) Giving any direction which the court thinks fit.

Arguably, were it possible to secure a lump sum of £100,000 at the outset of the claim, there would be legitimate concerns that:

- (1) You would satisfy one party's taste for litigation.
- (2) You would not give an incentive to one party to engage in negotiation and bring proceedings to an end.
- (3) There would be no attempt or desire to reduce the issue or limit the live matters before the court because, not unsurprisingly, litigants' attitudes towards proceedings often change depending upon who is meeting the cost.

However, the courts do appear to be sympathetic to the requests for interim periodical payments orders of varying amounts to get around this difficulty. Although the fully reported decision in *G v*

*G* is awaited, the mother was awarded £40,000 in respect of legal fees, said to be the shortfall between what she had already paid and what she was going to have to pay.

## WHAT THEN OF QUANTUM?

Do the courts intend to achieve equality of representation by such interim costs awards? Does the answer to that question depend upon the resources available? Take the example of a not significantly/fabulously wealthy father. Perhaps a man of modest means who chooses to instruct Leading Counsel in a situation where perhaps that choice is thought unnecessary. Is the mother entitled, as part of her claim for interim costs to argue 'equality of representation'? The answer, depending on the complexity of the case, is probably 'yes'. *MT v T* dwelt to a certain extent on quantum but was not a case that could be put into the category above. In *MT* the father had accepted that he was worth £40 million and lived a 'lavish lifestyle'. Charles J dwelt on quantum in terms of justifying the award with reference to the father's conduct.

'Here, on my analysis, as the interim payment in respect of costs is one that can be categorised as being for the benefit of the children, it seems to me... that the payments made can be taken into account in the substantive order made and this reduces the potential for unfairness to the respondent father... This father can be unscrupulous; he can lie and he can seek to exert undue pressure by reference to a lack of equality of arms...it is clearly for the benefit of these children in these proceedings that their case should be put before the court fully and properly

by counsel and that warrants their interim payment including a figure in respect of costs' (paras ]23] and ]25])

Charles J observed that if the proceedings were resolved amicably or in a shorter time than anticipated, he had no doubt that the applicant's solicitors would retain any balance of the sums paid in respect of costs and that it will , therefore, be available for repayment to the paying respondent party. The interim payment, including the up-front payment of legal costs, was categorised as relating to the payment of periodical payments (para ]28]).

## **CONCLUSION**

We would suggest that the following principles and elements of good practice can be derived from the above cases:

- (1) An application for interim legal costs may be made pursuant to an application under Sch 1 to the Children Act 1989;
- (2) An applicant under Sch 1 is applying in a representative capacity;
- (3) The claim for up-front legal costs must be manifestly for the benefit of the child;
- (4) As a matter of principle and jurisdiction, a properly formulated claim for legal costs to pursue a claim pursuant to Sch 1 is 'for the benefit of the child';
- (5) The issue of up-front legal costs is a matter of discretion for the court and overly excessive claim may risk being categorised as being designed to meet the applicant's 'taste for litigation';

- (6) The interim payment may be made as a payment for periodical payments;
- (7) The risk of an overpayment of an interim of payment of legal costs is ameliorated by the fact that the initial payment can be taken into account in the substantive order and that the applicant's solicitors will retain any balance of sums paid for repayment to the respondent payer;
- (8) An application should be made at any early stage in any suitable or appropriate case for an interim legal costs order.

Craig just a note to remind you one of my brackets isn't working, so I have used only the one quite a lot so do check through it's this one ].