In Practice

MPS and LSPOs: a practical guide

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This article is designed to provide a whistle stop tour of the law and procedure surrounding applications for maintenance pending suit ('MPS') and Legal Services Payment Orders ('LSPO'). It is intended to be a practical guide for those advising clients and considering whether to issue such an application.

Procedure

Applications for interim orders are governed by Family Procedure Rules 2010 ('FPR'), r 9.7. I do not intend to repeat its content but simply wish to point out the salient points, namely:

i. An application for an interim order shall be made using the Part 18 procedure.

ii. Where a party makes an application before filing a financial statement, the written evidence in support must (a) explain why the order is necessary and (b) give up to date information about that party's financial circumstances.

iii. Unless the respondent has filed a financial statement, the respondent must, at least 7 days before the court is to deal with the application, file a statement of his means and serve a copy on the applicant.

Important aspects of Part 18 procedure are:

i. There must be 14 days' notice provided to the other side.

ii. A draft order should be filed alongside the application.

iii. The application must be supported by written evidence.

iv. If the application seeks a hearing sooner than 14 days, written evidence in support must explain why it would be fair and just that the time should be abridged.

Costs

As an interim application, the usual 'no order as to costs' principle does not apply (r.28.4, FPR 2010). Thus, if an order for the costs of the hearing is being pursued at its conclusion, a statement of costs should be filed at court and on the other side at least 48 hours in advance of the hearing.

On an application for MPS the court exercises a broad discretion to make such order as the court thinks just (FPR, r 28.1).

The court can take into account *Calderbank* letters since FPR, r 28.3(8) which forbids the court to admit any offer to settle other than an open offer, does not apply. As a result, it is good practice for a respondent to send either an open offer or *Calderbank* offer, to provide an element of protection.

MPS

Dealing first with applications for MPS, when making the decision to issue such an application, one must bear in mind that the focus of an application for MPS is to meet an applicant's immediate needs or to 'hold the line' until a more detailed examination is possible. In the case of *Moore v Moore* [2009] EWCA Civ 1427, [2010] 1 FLR 1413 Coleridge J remarked:

> '[22]. . . It is designed to deal with short-term cash flow problems, which arise during divorce proceedings. Its calculation is sometimes somewhat rough and ready, as financial information is frequently in short supply at the early stage of the proceedings.'

The starting point is s 22 of the Matrimonial Causes Act 1973 which provides:

> '1. On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable.
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> 2. An order under this section may not require a party to a marriage to pay to the other party any amount in respect of legal services for the purposes of the proceedings.
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> 3. In subsection (2) "legal services" has the same meaning as in section 22ZA.'

In *TL v ML (ancillary relief: claim against assets of extended family)* [2005] EWHC 2860 (Fam), [2006] 1 FLR 1263 Mostyn J summarised the leading principles surrounding an application for MPS:

> '[123] The leading cases as to the principles to be applied on an application for maintenance pending suit are *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71 and *M v M (Maintenance Pending Suit)* [2002] EWHC 317 (Fam), [2002] 2 FLR 123:
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> [124] From these cases I derive the following principles:
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> (i) The sole criterion to be applied in determining the application is 'reasonableness' (s 22 of the Matrimonial Causes Act 1973), which, to my mind, is synonymous with 'fairness'.
> (ii) A very important factor in determining fairness is the marital standard of living (*F v F*). This is not to say that the exercise is merely to replicate that standard (*M v M*).
> (iii) In every maintenance pending suit application there should be a specific maintenance pending suit budget, which excludes capital or long-term expenditure, more aptly to be considered on a final hearing (*F v F*). That budget should be examined critically in every case to exclude forensic exaggeration (*F v F*).
> (iv) Where the affidavit or Form E disclosure by the payer is obviously deficient, the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say so of the payer as to the extent of his income or resources (*G v G*, *M v M*). In such a situation, the court should err in favour of the payee.
> (v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed, but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial (*M v M*).'

It is often the case that a decision to issue an application for MPS is made early on in proceedings, either before or at the point that the Form E is being prepared for the substantive proceedings. It is all too tempting to include the budget prepared for the purpose of Form E but consider this carefully. It is extremely important that a targeted interim budget is prepared bearing in mind that the court will be looking to meet an applicant's immediate needs until a final determination can be made. In *BD v FD (Maintenance Pending Suit)* [2014] EWHC 4443, [2016] 1 FLR 390 Fam

Moylan J rejected a wife's maintenance pending suit application on the basis that her interim budget manifestly exceeded the standard of living of the marriage. It was held that court intervention was not required to ensure her interim needs were met.

This will be a subjective assessment on a case by case basis for example when looking at the standard of living enjoyed during the marriage, a clothes allowance may be a perfectly reasonable interim need in one case but not another. It is important to consider the issue of proportionality when preparing an interim budget: by way of an example do not put a need for money for Christmas presents in an application being made in February. Begin with the mandatory liabilities such as; rent/mortgage payments, household bills, credit card minimum payments and go from there. A practical (albeit time consuming) way in which to ensure you input an accurate figure is to analyse the applicant's bank statements in the months leading up to the application. This will give you a true reflection of the applicant's interim income needs and will be much more persuasive to a judge.

Arrears

In *Moore v Moore* [2009] EWCA Civ 1427, [2010] 1 FLR 1413 it was held that arrears may be enforced unless 'special circumstances' exist regardless if the original suit discontinues or fails.

LSPO

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 added ss 22ZA and 22ZB into the Matrimonial Causes Act 1973 ('MCA 1973') which have been effective since 1 April 2013.

Section 22(3) of the MCA1973 now makes it clear that legal costs cannot be sought in an application for MPS. To obtain funds to cover legal services the correct vehicle is an application for an LSPO. Simultaneous applications must be made if both interim maintenance and provision for legal costs is sought. Both applications can be made using the same D11 form.

When considering such an application, the court must consider s 22ZB of the MCA1973, which provides:

> '1. When considering whether to make or vary an order under section 22ZA, the court must have regard to—
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> a. the income, earning capacity, property and other financial resources which each of the applicant and the paying party has or is likely to have in the foreseeable future,
> b. the financial needs, obligations and responsibilities which each of the applicant and the paying party has or is likely to have in the foreseeable future,
> c. the subject matter of the proceedings, including the matters in issue in them,
> d. whether the paying party is legally represented in the proceedings,
> e. any steps taken by the applicant to avoid all or part of the proceedings, whether by proposing or considering mediation or otherwise,
> f. the applicant's conduct in relation to the proceedings,
> g. any amount owed by the applicant to the paying party in respect of costs in the proceedings or other proceedings to which both the applicant and the paying party are or were party, and
> h. the effect of the order or variation on the paying party.
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> 2. In subsection (1)(a) "earning capacity", in relation to the applicant or the paying party, includes any increase in earning capacity which, in the opinion of the court, it would be reasonable to expect the applicant or the paying party to take steps to acquire.
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> 3. For the purposes of subsection (1)(h), the court must have regard, in particular, to whether the making or variation of the order is likely to—
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> a. cause undue hardship to the paying party, or
> b. prevent the paying party from obtaining legal services for the purposes of the proceedings.'

The type of orders that can be made are payment by way of a lump sum, payment by way of instalments, immediate payment and deferred payments. The court may restrict the legal representation available to a party by defining, from the menu at s 22ZA(10) for which 'part of the proceedings' (s 22ZA(5)) an applicant will be able to secure funding and the 'amount' (s 22ZA(1),(6)(a)).

The leading case is *Rubin v Rubin* [2014] EWHC 611 (Fam), [2014] 2 FLR 1018, in which Mostyn J again provided necessary guidance as to how litigants should approach an application for an LSPO and how the court should tackle such an application. At para [13] he stated:

> '[13] I have recently had to deal with a flurry of such applications and there is no reason to suppose that courts up and down the country are not doing likewise. Therefore it may be helpful and convenient if I were to set out my attempt to summarise the applicable principles both substantive and procedural.
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> i) When considering the overall merits of the application for a LSPO the court is required to have regard to all the matters mentioned in s 22ZB(1) – (3).
> ii) Without derogating from that requirement, the ability of the respondent to pay should be judged by reference to the principles summarised in TL v ML [2005] EWHC 2860 (Fam) [2006] 1 FCR 465 [2006] 1 FLR 1263 at para 124 (iv) and (v), where it was stated
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> "iv) Where the affidavit or Form E disclosure by the payer is obviously deficient the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say so of the payer as to the extent of his income or resources. In such a situation the court should err in favour of the payee.
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> v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial."
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> iii) Where the claim for substantive relief appears doubtful, whether by virtue of a challenge to the jurisdiction, or otherwise having regard to its subject matter, the court should judge the application with caution. The more doubtful it is, the more cautious it should be.
> iv) The court cannot make an order unless it is satisfied that without the payment the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. Therefore, 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 in CPR Part 44. 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.
> v) In determining whether the applicant can reasonably obtain funding from another source the court would be unlikely to expect her to sell or charge her home or to deplete a modest fund of savings. This aspect is however highly fact specific. If the home is of such a value that it appears likely that it will be sold at the conclusion of the proceedings then it may well be reasonable to expect the applicant to charge her interest in it.
> vi) Evidence of refusals by two commercial lenders of repute will normally dispose of any issue under s 22ZA(4)(a) whether a litigation loan is or is not available.
> vii) In determining under s 22ZA (4)(b) whether a Sears Tooth arrangement

can be entered into a statement of refusal by the applicant's solicitors should normally answer the question.

viii) If a litigation loan is offered at a very high rate of interest it would be unlikely to be reasonable to expect the applicant to take it unless the respondent offered an undertaking to meet that interest, if the court later considered it just so to order.

ix) The order should normally contain an undertaking by the applicant that she will repay to the respondent such part of the amount ordered if, and to the extent that, the court is of the opinion, when considering costs at the conclusion of the proceedings, that she ought to do so. If such an undertaking is refused the court will want to think twice before making the order.

x) The court should make clear in its ruling or judgment which of the legal services mentioned in s 22ZA (10) the payment is for; it is not however necessary to spell this out in the order. A LSPO may be made for the purposes, in particular, of advice and assistance in the form of representation and any form of dispute resolution, including mediation. Thus the power may be exercised before any financial remedy proceedings have been commenced in order to finance any form of alternative dispute resolution, which plainly would include arbitration proceedings.

xi) Generally speaking, the court should not fund the applicant beyond the FDR, but the court should readily grant a hearing date for further funding to be fixed shortly after the FDR. This is a better course than ordering a sum for the whole proceedings of which part is deferred under s 22ZA (7). The court will be better placed to assess accurately the true costs of taking the matter to trial after a failed FDR when the final hearing is relatively imminent, and the issues to be tried are more clearly defined.

xii) When ordering costs funding for a specified period, monthly instalments are to be preferred to a single lump sum payment. It is true that a single payment avoids anxiety on the part of the applicant as to whether the monthly sums will actually be paid as well as the annoyance inflicted on the respondent in having to make monthly payments. However, monthly payments more accurately reflects what would happen if the applicant were paying her lawyers from her own resources, and very likely will mirror the position of the respondent. If both sets of lawyers are having their fees met monthly this puts them on an equal footing both in the conduct of the case and in any dialogue about settlement. Further, monthly payments are more readily susceptible to variation under s 22ZA (8) should circumstances change.

xiii) If the application for a LSPO seeks an award including the costs of that very application the court should bear in mind s 22ZA (9) whereby a party's bill of costs in assessment proceedings is treated as reduced by the amount of any LSPO made in his or her favour. Thus, if an LSPO is made in an amount which includes the anticipated costs of that very application for the LSPO, then an order for the costs of that application will not bite save to the extent that the actual costs of the application may exceed such part of the LSPO as is referable thereto.

xiv) A LSPO is designated as an interim order and is to be made under the Part 18 procedure (see FPR rule 9.7(1)(da) and (2)). 14 days' notice must be given (see FPR rule 18.8(b)(i) and PD9A para 12.1). The application must be supported by written evidence (see FPR rule 18.8(2) and PD9A para 12.2). That evidence must not only address the matters in s 22ZB (1)–(3) but must

> include a detailed estimate of the costs both incurred and to be incurred. If the application seeks a hearing sooner than 14 days from the date of issue of the application pursuant to FPR rule 18.8(4) then the written evidence in support must explain why it is fair and just that the time should be abridged.'

This guidance has been incredibly helpful and provided much needed clarity. When approaching such an application the applicant should prepare a witness statement hitting each point of the *Rubin* checklist with supporting documentary evidence.

A judge at the FDR hearing should not hear an application to vary or extend a legal costs order under FPR 2010, r 9.17(2) (*Myerson v Myerson* [2008] EWCA Civ 1376, [2009] 1 FLR 826). A hearing date should be fixed shortly after the FDR to deal with the issue of further funding.

In *BC v DE (Proceedings under Children Act 1989: Legal Costs Funding)* [2016] EWHC 1806, [2017] 1 FLR 1521, Cobb J when considering the meaning of historic costs distinguished *Rubin* and held that there was no logical distinction between allowing prospective costs and outstanding costs which have been incurred from the date of the application. This is excellent authority for an applicant with unpaid historic costs. Cobb J provided:

> '[22] My concern is to ensure that the mother and father have equality of arms, and equal access to justice in this case. I do not, as Mr. Turner sought to persuade me, treat equality of arms as "equality of payments" – a suggestion that, £ for £, the father should ensure that the mother is more or less equally provided for in relation to her costs as he is. However, for as long as any client has incurred significant outstanding legal costs with his or her solicitor, there is no doubt but that they become bound ("beholden" per Mr. Harker, see [9] above) to each other by the debt; this may well impact on the freedom of, and relative strengths within, their professional relationship. Further, the solicitor may feel constrained in taking what may be important steps in relation, for instance, to discovery, or in relation to exploring parallel non-court dispute resolution. The debt may materially influence the client's stance on possible settlement, and the solicitor's advice in relation to the same: a client – without independent resources – is in a vulnerable position, and may be more inclined to accept a settlement that is less than fair simply because of the concerns about litigation debt. This would not be in the interests of this, or any, child in Schedule 1 proceedings. A level playing field may not be achieved where, on the one side, the solicitor and client are 'beholden' to each other by significant debt, whereas on the other there is an abundance of litigation funding. Though there is an increasingly familiar and commendable practice of lawyers acting pro bono in cases before the family courts, particularly where public funding provision previously available has been withdrawn, legal service providers, including solicitors and barristers, are not charities, nor are they credit agents. It is neither fair nor reasonable to expect solicitors and the bar to offer unsecured interest-free credit in order to undertake their work; there is indeed a solid reason for lawyers not to have a financial interest in the outcome of family law litigation.
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> [24] On the significant point of principle in issue in this case, my view is as follows. In Rubin, Mostyn J was not considering legal costs funding in ongoing proceedings; he was dealing with truly 'historic' costs which had arisen in two separate sets of proceedings (i.e. divorce and child abduction), which had, importantly, concluded. The financial proceedings had been stayed (proceedings were now ongoing in California), and the mother and children had returned to California, pursuant to orders made by Hogg J under the Hague Convention 1980. There was, as Mostyn J observed, no further litigation in this country, and no

> litigation in prospect. I consider that Mostyn J was right to reject a legal costs funding application as a vehicle to recoup the costs of either or both of these concluded claims. But that type of application is distinguishable from the type of situation here, where the legal costs funding claim arises in relation to costs reasonably and legitimately incurred within ongoing proceedings prior to the determination of the legal costs funding application
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> [26] I would just make this further point. I would not regard it as necessary for an applicant to demonstrate that his or her solicitor has actually 'downed tools' or will do so before he or she could legitimately make an application for a legal costs funding order where 'historic' costs have been incurred. Such an approach could be problematic. I agree with the essence of Mostyn J's approach – namely that a clear case would need to be shown that the solicitors are reaching the end of their tolerance – but the approach described in [16] of Rubin ought not to be applied too strictly, otherwise it would work materially to the disadvantage of the honourable solicitor who is prepared to soldier on (perhaps somewhat against their better commercial judgment) for the good of the client or the case.'

A helpful case for those representing a respondent is *LKH v TQA AL Z (Interim Maintenance and Costs Funding)* [2018] EWHC 1214 (Fam) where Holman J relied heavily on Mostyn J's decision in *Rubin*. Despite the fact that W had unpaid costs of over £200,000, Holman J was not taken to the decision of *BC v DE* and declined to accept the submission that if this was not repaid the solicitors acting for W would cease to act. He stated that:

> '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.'

Accordingly, he limited her award to a monthly payment in respect of future costs alone. In relation to interim periodical payments he declined to make an award to assist the wife to repay debts. He stated:

> '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.'

This case provides a stark reminder that it is good practice for the fee earner representing the applicant to complete a witness statement confirming he/she will have no choice but to 'down tools' so that there is no ambiguity in respect of the point flagged in *Rubin* at para [13](iv).