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Issue 37

The New Legal Services Order from 1 April 2013

1. Just in case you did not attend any of the recent seminars on this subject, two important new sections are inserted into the **Matrimonial Causes Act 1973** to help such litigants overcome the problem of costs litigation funding (ie **Currey** orders). They are **ss. 22ZA** and **22ZB MCA 1973** (corresponding amendments will be made to **Schedule 5 to the Civil Partnership Act 2004**).

2. The Commencement Order bringing these new provisions into force from 1 April 2013 is **The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No.7) Order 2013**.

3. **In Summary:** The new Regulations:

- abolish MPS "costs allowance" provisions, ie *Currey* orders (after *Currey v Currey (No 2)* [2006] EWCA Civ 1338) – albeit the same will continue to be referred to for interpretation;
- create a statutory authority for "an order or orders requiring one party to the marriage to pay the other ("the applicant") an amount for the purpose of enabling the applicant to obtain legal services for the purpose of the proceedings." ie The "Legal Services Order" is *a relief in its own right*; and
- amend **s.24A(1) MCA 1973** so that an order made for a Legal Services Order can be backed by an interim order for sale with the Court endowed with the usual powers to direct and enforce the sale.

(The parallel jurisdiction under **Schedule 1 to the Children Act 1989** re interim lump sums on account of costs **CF v KM (Financial Provision for Child: Costs of Legal Proceedings)** [2010] EWHC 1754 (Fam) remain unaffected by the new statutory provisions).

4. **The new provisions Ss 49-50 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012** amend the **Matrimonial Causes Act 1973**. The basic changes:-

- **S 22ZB(2)** allows for an order or orders to be made.
- **S 22ZA(6)** provides that the payments may be made in instalments. (Hence, there can be one global sum as an alternative to instalments).
- Under **s.22ZA(3)** the court "may not make" an order "unless satisfied" that without the amount the applicant would not "reasonably" be able to obtain "appropriate" legal services for the proceedings or part of the proceedings. The burden of proof, as under **Currey**, remains on the Applicant for an order).



- This discretion is assisted by a checklist at s **22ZB(1)** and pre-conditions set out in s.**22ZA(4)** which provide that in considering ss (**3**) the court "must be satisfied" that the Applicant cannot:-

i) reasonably secure a loan; and

ii) is unlikely to be able to obtain services via the granting of a charge over assets recovered in the proceedings.

5. In **TL v ML** the test required the "production of two letters from the bank" and a solicitor's letter confirming that there was no *Sears Tooth* charge option. Concern has already been expressed that this is now a less than rigorous requirement since it is very easy to acquire this basic form of documentation from High Street lenders – should there now be specialist lender documentation required and what is to be considered as an excessive lending requirement. In addition, only certain solicitors have relationships with specialist matrimonial lenders/have *Sears Tooth* facilities – should production from other solicitors of confirmation that funding is not available now be sufficient – **Article 6** does not entitle a litigant to pick and choose representation.

- **S 22ZA(5)** provides that the legal services order may be made for a specified purpose or for a specified period of the proceedings. In **Currey** the costs are limited up to the FDR. However, this provision now goes further in providing that the funding may be limited to particular aspects of the proceedings. Ie specific issues for example.
- The threat of an interim order will affect the parties approach overall – the threat of a sale of an asset in advance of the final hearing will concentrate the parties' minds earlier to the final effect of the proceedings and may require the sale of the central asset at an earlier stage.
- By the checklist contained in s.**22ZB(1)**, ss (**h**) requires the court to consider "the effect of the order or variation on the paying party" and s.**22ZB(3)** states the court "must have regard, in particular" to whether an order will:

i) Cause undue hardship on the paying party, or

ii) Prevent the paying party from obtaining legal services for the purpose of the proceedings.

Ie as in s **25A(2)**, so here all such LSOs will cause some hardship, but is it 'undue'

6. Human Rights: This will be engaged until we have a High Court determination. Article 6 (right to fair trial) and Article 1 of the First Protocol (peaceful enjoyment of possessions, except in the public interest and as provided by law) compete in this context. However the provisions of Article 1 have never fared well before the Matrimonial Court (see **Wilson v First Country Trust Limited** [2003] UKHL 40, Lord Nicholls, obiter, **Charman v Charman (No 2)** [2006] EWHC 1879 Coleridge J at [126], Moylan J in **C v C** [2007] EWHC 2033 (Fam) at [96] and **NG v KR (Pre-nuptial contract)** [2008] EWHC 1532 (Fam), Baron J at [135]. Ultimately, the Court will need to read the primary legislation, in



this context s.22ZA, in a way which is compatible with the Convention rights and the same is likely to be found to be in the 'margin of appreciation', if past decisions in this area are to be seen as a guide.

Appendix: Statutory Changes:

49 Divorce etc proceedings: orders for payment in respect of legal services

- (1) In section 22 of the Matrimonial Causes Act 1973 (maintenance pending suit)—(a) number the existing provision subsection (1), and
(b) after that subsection insert—

"(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.

(3) In subsection (2) "legal services" has the same meaning as in section 22ZA."

- (2) After that section insert—

"22ZA Orders for payment in respect of legal services

(1) In proceedings for divorce, nullity of marriage or judicial separation, the court may make an order or orders requiring one party to the marriage to pay to the other ("the applicant") an amount for the purpose of enabling the applicant to obtain legal services for the purposes of the proceedings.

(2) The court may also make such an order or orders in proceedings under this Part for financial relief in connection with proceedings for divorce, nullity of marriage or judicial separation.

(3) The court must not make an order under this section unless it is satisfied that, without the amount, the applicant would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings.

(4) For the purposes of subsection (3), the court must be satisfied, in particular, that—

(a) the applicant is not reasonably able to secure a loan to pay for the services, and

(b) the applicant is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.

(5) An order under this section may be made for the purpose of enabling the applicant to obtain legal services of a specified description, including legal services provided in a specified period or for the purposes of a specified part of the proceedings.

(6) An order under this section may—

- (a) provide for the payment of all or part of the amount by instalments of specified amounts, and



(b) require the instalments to be secured to the satisfaction of the court.

(7) An order under this section may direct that payment of all or part of the amount is to be deferred.

(8) The court may at any time in the proceedings vary an order made under this section if it considers that there has been a material change of circumstances since the order was made.

(9) For the purposes of the assessment of costs in the proceedings, the applicant's costs are to be treated as reduced by any amount paid to the applicant pursuant to an order under this section for the purposes of those proceedings.

(10) In this section "legal services", in relation to proceedings, means the following types of services—

(a) providing advice as to how the law applies in the particular circumstances,

(b) providing advice and assistance in relation to the proceedings,

(c) providing other advice and assistance in relation to the settlement or other resolution of the dispute that is the subject of the proceedings, and

(d) providing advice and assistance in relation to the enforcement of decisions in the proceedings or as part of the settlement or resolution of the dispute, and they include, in particular, advice and assistance in the form of representation and any form of dispute resolution, including mediation.

(11) In subsections (5) and (6) "specified" means specified in the order concerned."

50 Divorce etc proceedings: matters to be considered by court making legal services order.

After section 22ZA of the Matrimonial Causes Act 1973 insert-

22ZB Matters to which court is to have regard in deciding how to exercise power under section 22ZA

(1) When considering whether to make or vary an order under section 22ZA, the court must have regard to—



- (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.

(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.

(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—

- (a) cause undue hardship to the paying party, or
- (b) prevent the paying party from obtaining legal services for the purposes of the proceedings.

(4) The Lord Chancellor may by order amend this section by adding to, omitting or varying the matters mentioned in subsections (1) to (3).

(5) An order under subsection (4) must be made by statutory instrument.

(6) A statutory instrument containing an order under subsection (4) may not be made unless a draft of the instrument has been laid before, and approved by a resolution of, each House of Parliament.

(7) In this section "legal services" has the same meaning as in section 22ZA."

51 Divorce etc proceedings: orders for sale of property In section 24A(1) of the Matrimonial Causes Act 1973 (orders for sale of property), after "makes" insert "an order under section 22ZA or makes".

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