



Neutral Citation Number: [2022] EWHC 1101 (Fam)

Case No: FA-2022-000067

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 11/05/2022

**Before :**

**SIR JONATHAN COHEN**

**Between :**

**G**  
**- and -**  
**W**

**Appellant**

**Respondent**

**Mr C Hale QC** (instructed by **Dawson Cornwall**) for the **Appellant Mother**  
**Mr J Tod** (instructed by **Malcolm C Foy & Co**) for the **Respondent Father**

Hearing dates: 4 May 2022

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**Approved Judgment**

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SIR JONATHAN COHEN

This judgment was delivered in public. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**SIR JONATHAN COHEN:**

1. I am dealing with an appeal by the mother (“M”) in proceedings under schedule 1 Children Act 1989 wherein she appeals with permission granted by me an order of Recorder Chandler QC. Although it is now over 2 months after the handing down of the written judgment, the order has still not been finalised. The parties must return urgently to the judge for him to determine the outstanding issues.
2. The parties are together the parents of a child (“C”) now aged just 2 years old. He lives with M. Both parents are aged 31. M earns a negligible income as a social influencer and the father (“F”) is a highly successful sportsman. He earns a very large sum of money and there is no issue in this case about his ability to pay anything which the court might order.
3. The big figures in the application were agreed before the final hearing started. They are as follows:
  - i) The provision of a housing fund of £1.35m, together with a furnishing fund;
  - ii) Periodical payments at the rate of £8,000pm;
  - iii) Nursery and school fees to be paid by F;
  - iv) The provision of a car.
4. The judge said this about the parties’ agreement:

*5. Accordingly, the parties have agreed a financial package which in my judgment generously meets C’s housing need, his educational costs, maintenance including a carer’s allowance, with the additional benefit of a replacement car every four years.*

*6. It might be thought that a package of this nature would satisfy all claims that could be made on behalf of a child who is not yet two years old.*
5. The remaining issues which the judge had to determine are set out by the judge as follows:

*7. In fact, there are five issues between the parties, of which the first two are both the most significant in financial terms, and which turn on the application of issues of principle, namely:*

*(1) Should the Father clear all of the Mother’s liabilities, however they may have arisen, because it is in the best interests of C that his mother should at the conclusion of this case be debt free? and*

*(2) Should the Father pay additional periodical payments to the Mother, on top of the agreed sum of £96,000 pa, to enable Mother to employ a nanny (or other regular child care), on the basis that (i) this will provide the Mother with some needed respite or wraparound care, related to her health problems, and/ or (ii) the nanny will enable the Mother to rebuild her career so that she can work towards achieving financial independence when the Father’s financial support comes to an end.*

8. *In outline, the five issues are as follows:*

*Firstly, the Mother seeks a lump sum of circa £316,133 to pay all of her liabilities, which can be broken down into two broad categories, (a) personal debt, including debt owed to financial institutions and monies loaned from family members, and*

*(b) unpaid legal costs, owed principally to her former advisers, Messrs Howard Kennedy;*

*Secondly, the Mother seeks additional periodical payments of £36,000 pa (reducing to £24,000 when C starts school) which are earmarked for a nanny, until C's 18th birthday, with a review clause when he is eleven years old;*

*Thirdly, the Mother seeks a lump sum in the amount of circa £9,000 to cover a prospective operation to remedy two gynaecological problems which are described at [322] (haemorrhoidectomy and excision of anal fissure: £3,856) and at [324] (posterior colporrhaphy and perineal refashioning: £5,225);*

*Fourthly, the Mother seeks further lump sums of circa £13,000 relating to security and moving costs for her new property; and*

*Fifthly and finally, the parties disagree as to when the agreed periodical payments order of £8,000 pm should start.*

6. The judge ordered as follows:

- i) M's legal costs were all to be paid by F but subject to a potential clawback in respect of the approximate sum of £130,000.
- ii) The judge declined to make any separate provision for a nanny or a childcare fund;
- iii) No provision was made for M's medical treatment;
- iv) No additional security provision for M's new home was provided;
- v) The judge backdated the periodical payments order to the start of proceedings so as to provide a sum of £60,000 which was sufficient to clear M's commercial borrowings. He declined to make provision for payment of any of her other debts.

7. I granted permission to appeal in respect of items ii) and v) but refused permission on the other grounds. M seeks to renew her application for permission to appeal those matters.

8. I shall deal with the issues in respect of the order of importance as the parties and I agree them to be.

9. The issue of payment for additional childcare ("the nanny") interrelates to some extent with the question of M's debts. M's nanny claim comprises two elements, namely past costs incurred and future costs.

10. In respect of past costs the judge said this at paragraph 68:

*... the Mother has paid for childcare throughout C's life, even though this was specifically disallowed by DDJ Morris and HHJ Wright who commented "I am clear however, on an interim basis, there is no justification for awarding childcare costs". This was initially provided by her own mother, who she paid £2,000 pm (May to December 2020). From January 2021 she paid a professional nanny, initially at the rate of £2,550 (February to August 2021) and more recently at £3,000 pm. The total cost of this childcare, which was not included in the assessment of her interim budget, was £48,900.*

11. Put bluntly, M incurred these costs knowing full well that the court had expressly refused to make provision for them within its interim orders. Only £4,000 of the £49,000 odd was incurred before DDJ Morris refused to sanction such an expense. M's appeal was unsuccessful, the judge determining that there was no need for M to have a nanny during lockdown. Undaunted by the lack of provision by the court, M simply borrowed the money from her grandparents instead.

12. Whilst the judge at paragraph 116 of his judgment said that he did not accept M's evidence in relation to the amount that she has incurred, this does not seem consistent with paragraph 68. I have for these purposes accepted that these costs were incurred. The question is should F have to pick up the tab, or any part of it, in circumstances where the court expressly said that this was not to be part of the order.

13. M for the future seeks an allowance for the costs of a nanny as follows:

- i) £3,000pm index linked until C starts school in September 2025. If capitalised, that is 42 months producing a requirement of £126,000
- ii) From age 5-11 payment at the rate of £2,000pm index linked (£144,000)
- iii) Such sum as is reasonable following a review when C reaches the age of 11.

14. I have heard debate between the parties as to whether any sum that the court awards should be by way of top-up periodical payments or by way of a capital sum. M inclines, but not strongly, to a monthly payment to reduce the risk of bankruptcy in the event that her unsatisfied creditors (her grandparents and brother-in-law) take proceedings against her. F seeks the finality by way of the making of a lump sum order.

15. F's position was that whilst he was not convinced that M had any requirement for a nanny fund, nevertheless in his position statement drafted by Miss Saxton, who appeared for F at trial but who was unavailable for this hearing, he "*offered a float of £50,000 to provide backup childcare outside nursery/family support if required*". That was a reduction from his previous offer of £100,000 under this head.

16. It was agreed between the parties that the payment of £8,000pm was exclusive of any third party childcare costs. The issue between the parties was whether £50,000 was sufficient or not.

17. The judge took a very dim view of M's evidence. He regarded in particular two aspects of her presentation as deserving criticism:
- i) Her expenditure of £49,000 on a nanny when no such provision was made and further expenditure from money borrowed from relatives of some £75,000 on shopping and holidays in a manner which the judge described as "reminiscent of someone who has won the pools".
  - ii) Her claim that her medical condition so laid her low for an 8 day period in January 2022 that she was bedbound, when in fact analysis of her bank statements showed her spending over £500 in petrol and over £7,000 on substantial personal expenditure.

18. The judge determined that he was not bound by the parties' approach to the issue of a fund for childcare and he said this:

*115. The Mother's case for additional periodical payments is put on two bases: firstly, to provide for childcare costs; secondly, to enable her to restart her career.*

*116. As to the first, I have allowed for some element of reimbursing the childcare costs in the lump sum of £60,000, while not accepting the Mother's evidence in relation to the amount she has incurred.*

*117. I am satisfied in future that the Mother's need for childcare will only be occasional and can be afforded out of the agreed child maintenance of £8,000 pm. I also take the view that the time has now come for the Mother to take steps to put C into a nursery, to assist with his development and socialisation before he starts school in September 2024. The Mother in her evidence acknowledged that C can go to nursery "but not yet and not full time" [198]. In my view, steps should be taken to start C in nursery sooner rather than later and the very fact of attending nursery will afford the Mother some of the respite care she needs.*

19. Whilst I entirely agree with the judge that childcare costs to restart a career do not fit within the scheme of schedule 1, the difficulty that these paragraphs create is that the lump sum of £60,000 which the judge described as "reimbursing the childcare costs", was in fact put by him to meet M's commercial debts.

20. Plainly the same sum of money cannot:

- i) meet commercial debts
- ii) meet the reimbursing of childcare costs
- iii) meet future childcare costs.

21. The judge, recognising this conundrum, directed that future childcare costs should be paid out of the £8,000pm which was free money in M's hands in the sense that she had already been provided with a rent-free property, a car and nursery expenses.

22. While the judge's approach might properly be adopted in some cases, it seems to me with respect to a very experienced money practitioner, that he was wrong to

adopt that approach in the light of the way that the case was presented to him and the express agreement between the parties that £8,000 was exclusive of third party childcare costs. I therefore conclude on this issue that I am entitled to reconsider this element of the case.

23. In my judgment the judge was wrong to dismiss M's need for a nanny. She had not lived on her own before, certainly not since C was born. She has various health difficulties, although not of a very severe kind. She will not have any assistance with childcare from F. C's father is a wealthy man. It seems to me not unreasonable for M who will be moving out of her family home to a new home that she should need some form of extraneous childcare.
24. I was initially minded to make a lump sum order to reduce the risk of further applications and costs being incurred but on reflection, I have decided to take a different course. My main concern must be C, and I am anxious that if I made a lump sum order, the payment would not be used by M for its intended purpose but would instead be used either to repay the soft familial debts or otherwise spent by her.
25. I consider that M's request for the provision of a nanny two days a week at 12 hours each occasion is somewhat excessive. C will be at nursery for 3 hours a day. I consider that the proper provision would be for:
  - i) F to fund 16 hours of childcare a week which at £20ph (inclusive of the cost of employers NIC and tax and which is not a figure that has been in dispute) from now until September 2025 when C will start school is appropriate. That will require a payment of £1,386pm.
  - ii) From September 2025 until September 2031, when C reaches the age of 11 and will be at all day school, and when the requirement for nanny care will reduce to 6 hours per day for 2 days a week producing a monthly need of £1,040pm.
  - iii) I see no basis for such provision to continue beyond September 2031.
26. To the extent that any childcare costs are incurred by M over and above these figures, they must be paid by her out of her monthly allowance of £8,000.
27. I turn now to the question of the past costs. I accept that M has incurred nearly £49,000 of costs, albeit in plain breach of the court's intention. A significant part of those costs was money that M chose to pay to her own mother. By the time that the matter came to trial, lockdown had long ceased. In addition there had been no nursery provision before the hearing so that the whole of the child caring responsibilities would have fallen on M or such other person whom she arranged to share them with.
28. I am not prepared to cause F to refund sums paid by M to her own mother as a voluntary payment. I am prepared to backdate the allowance that I have made for child costs to the time when the professional nanny came in in January 2021, which at 14 months would have produced a figure of £19,400 but to reflect the fact that M chose to do this notwithstanding the court order I reduce the sum to £10,000 being a rounded up 50% figure.

29. I make no further provision for the payment of M's other debts which have been caused by reckless over-expenditure. To the extent that her grandparents and brother-in-law lent money, they went into it with their eyes open. I do not accept that there is any child-focussed argument for payment of those sums by F. I regard it as highly unlikely that M's relatives would make her bankrupt. I do not consider that the existence of M's debt created during the currency of these proceedings would impact on C's welfare.

The costs clawback:

30. F spent a little over £200,00 in defending this application. M, astonishingly, spent over double that sum. By two LSPOs F paid nearly £270,000 towards M's costs. This did not meet her costs and she was left with a shortfall of some £150,000 by way of unpaid legal fees. In particular, her legal costs included:
- i) Just under £70,000 in respect of an appeal against the interim maintenance order, from which she recovered just £3,000;
  - ii) £60,000 by way of overshoot from the LSPO that had been made.
31. The judge had sympathy with F's submission that he should not be responsible for those costs but thought that this hard debt had to be paid in the first instance by F to remove it from M's liabilities, even though on a merits basis such an award would not be made. However, the judge included what he described as a "clawback" so that in the event that there were further hearings in this matter before C reached the age of 11, F could, at least in theory, apply to the court for permission to reclaim those sums from M.
32. Such an award in the context of a schedule 1 application is unusual but I do not accept the submission on behalf of M that this amounts to an unreasonable fetter on her access to justice. It seems to me it was an award that was eminently within the discretion of the judge in the circumstances of the case.
33. M sought also two relatively small sums of money in respect of:
- i) the expenses of a gynaecological operation that she might have to undergo; and
  - ii) for additional security to her new home.
34. As to the former, there was no satisfactory evidence before the court that the operation was either necessary or urgent and in any event it is likely to be carried out on the NHS in the latter part of 2023. The judge was entitled to come to the conclusion that M had not proved her case that the operation was required and, if it was required, why M had not already undertaken it given the access to funds that she had.
35. F has agreed to pay for gates for the new property to be occupied by M and C. An additional sum was sought by M to pay for CCTV and an intruder alarm. During the course of the hearing F has agreed that M can spend funds that he will provide within the £1.35m housing fund for these purposes if they are not already in place in her new property. It would not be right to make any further order.

36. In the circumstances therefore I reject M's application by way of oral renewal for permission to appeal those parts of the judge's order. The appeal is allowed to the extent indicated, namely that in respect of the nanny provision.