W v J (CHILD: VARIATION OF FINANCIAL PROVISION) [2003] EWHC 2657 (Fam)

[2004] 2 FLR 300

Family Division

Bennett J

24 October 2003

Financial provision – Parent seeking increase in child's periodical payments to cover legal costs – Jurisdiction to make order under Children Act 1989, Sch 1 or inherent jurisdiction

The parents, who had never married, had a long history of litigation over a host of issues in relation to their daughter. In the course of this litigation the child was made a ward of court and an order made by consent set out the amount of periodical payments the father was to make for the child. The mother was seeking a variation in those payments under Sch 1 to the Children Act 1989, or under the court's inherent jurisdiction, to cover her estimated legal costs in relation to a forthcoming contested dispute as to residence, leave to remove the child from the jurisdiction, and financial provision for the child.

Held – dismissing the mother's application –

(1) The court had no jurisdiction under s 15 of and Sch 1 to the Children Act 1989 to order one parent to make a payment to the other parent to cover the latter's legal fees in relation to litigation over their child or children. The words 'for the benefit of the child' in para 1(2)(a) of Sch 1 were not wide enough to include monies payable by one parent for the other's legal fees. A parent seeking the upfront payment of his or her legal fees against the other parent was seeking a benefit for him/herself and not for the child (see paras [45]–[49]).

(2) The court had no jurisdiction under the inherent jurisdiction to make the order sought. It would be a misuse of wardship powers to invoke them to make an order which essentially benefits the parent and not the child (see para [48]).

(3) Even if the court had jurisdiction, applying para 4 of Sch 1 to the Children Act 1989, it would have been wrong for the court to have exercised its discretion in favour of the mother (see paras [50]–[66]).

Statutory provisions considered

Family Law Reform Act 1969
Guardianship of Minors Acts 1971
Guardianship of Minors Acts 1973
Matrimonial Causes Act 1973, s 22
Children Act 1975
Family Law Reform Act 1987
Children Act 1989, s 15, 91(14), Sch 1
Child Support Act 1991
Hague Convention on the Civil Aspects of International Child Abduction 1980

Cases referred to in judgment

A v A (A Minor) (Financial Provision) [1994] 1 FLR 657, FD
A v A (Maintenance Pending Suit: Provision for Legal Fees) [2001] 1 WLR 605, [2001] 1 FLR 377, FD
Calderdale Borough Council v H and P [1991] 1 FLR 461, FD
G v G (Maintenance Pending Suit: Costs) [2002] EWHC 306 (Fam), [2003] 2 FLR 71, FD
Gojkovic v Gojkovic and Another [1992] Fam 40, [1991] 3 WLR 621, [1991] 2 FLR 233, [1992] 1 All ER 267, CA

[2004] 2 FLR 301

Haroutunian v Jennings (1980) 1 FLR 62, FD
J v C (Child: Financial Provision) [1999] 1 FLR 152, FD

Keller v Keller and Legal Aid Board [1995] 1 FLR 259, CA
P (Child: Financial Provision), Re [2003] EWCA Civ 837, [2003] 2 WLR 865, [2003] 2 FLR 865, [2003] All ER (D) 312 (Jun), CA

Charles Howard QC for the applicant mother
Deborah Bangay for the respondent father

Cur adv vult

BENNETT J:
[1] By an application dated 10 June 2003 the mother asked the court to vary the order made by consent on 10 April 2001 by Hogg J whereby the father of T, who was born on 12 March 1997 and is therefore now 6½ years old, was ordered to pay periodical payments for T at the rate of US$14,000 per quarter, which, converted into sterling, is the equivalent of £2,700 per month or £32,400 per annum. The mother seeks an upward variation of an additional £146,000 per annum, which is the estimated legal costs she may incur between July 2003 and March 2004. The hearing is listed before Hogg J on 22 March 2004, estimated to last 10 days.
[2] Mr Howard QC, on behalf of the mother, has submitted that the court has jurisdiction to make such an order pursuant to either s 15 of and Sch 1 to the Children Act 1989 or the inherent jurisdiction, and that in its discretion the court should make such an order. Miss Bangay, for the father, submitted that the court has no such jurisdiction or, if it does, then the court should decline to exercise its discretion in favour of the mother.
[3] So far as I or counsel are aware, there is no authority which touches upon the issue in this case, that is to say whether the court can and should order one parent to make, by way of periodical payments, provision to the other parent for the latter's legal fees in a contested dispute as to residence, leave to remove the child from the jurisdiction and financial provision for that child.
[4] Any such application now made by the mother cannot be made under the Matrimonial Causes Act 1973 for the simple reason that T's parents never married. However, two recent authorities have undoubtedly given an impetus to the mother's application. In *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 WLR 605, [2001] 1 FLR 377 Holman J decided that s 22 of the Matrimonial Causes Act 1973 did give the court power to award a wife petitioner by way of maintenance pending suit £4,000 per month towards her legal expenses in prosecuting her suit. The judge found that 'maintenance' was a word of sufficiently wide meaning to permit such an order. In *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71 Charles J agreed with Holman J and awarded the wife £10,000 per month to defray her legal costs in order to prosecute her ancillary relief claim.
[5] Before turning to the submissions, I should outline, first, the nature of the current litigation between the mother and the father and, secondly, the background.
[6] The most recent bout of litigation has a sad backdrop. The mother is a US citizen but lives in London with T in accommodation provided by the father. In July 2002 the mother and T went to Florida ostensibly for a holiday.

In fact, on 2 August 2002 she underwent a mastectomy for breast cancer. On 4 September 2002 the mother issued a summons for leave to remove T from the jurisdiction for a period of 18 weeks so that she could undergo medical treatment. On 9 September Sumner J granted that leave from 16 September and she was to return by 20 January 2003. The mother was ordered to disclose certain medical reports. She disclosed a report on 19 July 2001 from which it is apparent that she was plainly warned that she might well have breast cancer.
[7] On 13 September 2002 Sumner J dismissed the father's application to set aside his order of 9 September but varied the dates to 19 September and 23 January 2003 respectively. The judge expressed his concern that the mother had manipulated

matters by engineering the discovery of her cancer in Florida so that she could portray a failure by, and a loss of confidence in, her English doctors. On 16 September the Court of Appeal refused the father permission to appeal, stating that, despite strong evidence of manipulation, the need for the mother to be treated prevailed.

[8] On 19 December the mother was in Florida. She sent a fax to the father in respect of Christmas contact. The fax was to the effect that the father could not have contact unless he agreed to three matters: first, to lodge an undertaking to return T to the mother; secondly, he agree that T should telephone her mother daily; and, thirdly, that he agree, there and then, to a variation of the Christmas contact for 2003. The matter, therefore, returned to court. On 20 December 2002 Johnson J ordered contact to the father and ordered the mother to pay the father's costs on an indemnity basis.

[10] There then arose a dispute when the mother and T should return to England. The mother sought an extension because, she said, her treatment had not been completed. On 14 January 2003 Sumner J dismissed the mother's application to vary the dates. He ordered her to pay the father's costs on a standard basis. On 16 and 22 January the mother was refused permission to appeal by the judge and the Court of Appeal respectively.

[11] In February 2003 the mother applied without notice to the father for leave to take T to the USA for one week. On 17 February before Sumner J the mother abandoned her application. The mother was ordered to pay the father's costs on the standard basis. On 3 March 2003 the father applied for an order that T be not removed from the jurisdiction by the mother without leave, and, further, for an order under s 91 (14) prohibiting the mother from making any further application in respect of T without the court's leave.

[12] On 27 March 2003 the mother responded with a veritable battery of applications. They were no less than 22 in number. They are as follows:

(1) An order for the father to make full financial disclosure.
(2) An order for replies to requests made on 19 March 2002.
(3) A full review of current financial and housing provision for T.
(4) Discharge or review of para 9 of the order of Hogg J on 10 April, which related to school fees.
(5) A review of that part of the order of Hogg J in relation to medical expenses.
(6) The father was to provide documentary proof of life insurance for T; liberty to endorse a penal notice was sought.
(7) An order for payment of the mother's historic unpaid bills relating to T.

[2004] 2 FLR 303

(8) An order for the father to give disclosure and inspection of correspondence and other documentation with G School.
(9) A full review of T's present educational arrangements.
(10) An order that all of the father's doctors and psychiatrist provide certain specified information.
(11) An order that a court-appointed social worker attend and report on T's contact with the father.
(12) A supervised contact order on terms that T be accompanied at all times on contact with the father by a nanny approved by the mother, the father to pay her costs.
(13) Discharge of that part of the order of Hogg J relating to contact on Wednesday afternoons.
(14) Discharge or review of that part of the order of Hogg J in relation to arrangements for collection and return in the USA.
(15) Discharge or review of arrangements for collection and return of T for contact.

(16) Discharge or review of that part of the order of Hogg J in respect of T's passport.
(17) A review of the originating summons.
(18) A residency order that T reside with the mother and revocation of the wardship.
(19) An order granting the mother leave permanently to remove T from the jurisdiction to reside in Florida.
(20) Discharge or review of that part of Hogg J's order relating to an injunction restraining her from causing or permitting medical, psychiatric, psychological or social examination of, or consultation about, T.
(21) The father to pay the mother's costs.
(22) Such other orders as the court deemed appropriate.

[13] On 23 April the father issued his application for a residence order. On 6 May Hogg J made a raft of orders in respect of evidence disclosure and ordered a Children and Family Court Advisory and Support Service (CAFCASS) report. On 22 May the judge fixed a hearing in front of herself for 22 March 2004 with an estimate of 10 days.

[14] I now turn to the less recent history. Miss Bangay has submitted that it is relevant to the exercise of my discretion. I should emphasise that her primary submission is that the mother's application fails in limine for want of jurisdiction.
[15] The father is 44 and a US citizen. In 1986 he came to live and work in London. He has been here ever since. The mother is 47 and is, as I have said, a US citizen, who in 1971 came to live in London. In January 1995 the father and the mother met. After T's birth, the parties lived in London, though it seems largely in separate homes. In 1999 the father says that he was having contact problems and he consulted solicitors. On 25 November 1999 the mother left for Florida, taking T with her without telling the father. In January 2000 the mother started proceedings in Florida, seeking financial support from the father for T and an order restraining him from removing T from Florida. On 14 March 2000 the father applied in the Florida court to dismiss the mother's proceedings. In April the father applied here for a parental responsibility order and in May for contact.

[16] Unknown to the father, on 3 May 2000, the mother had initiated an action for damages for no less than US$73m in the state of New York in which she stated that she resided at an address in New York. On 5 May 2000 the father was in his hotel in New York because he had come by arrangement to see T. As he stepped out of his hotel bedroom, he was served with the New York proceedings.
[17] On 24 May 2000 the father issued in the High Court an originating summons in wardship. On the same day Wall J (as he then was) confirmed the wardship and granted the father a parental responsibility order. During the summer the matter came back in front of a High Court judge on three occasions largely in respect of contact of the father to T in the USA. On 23 August 2000 it was ordered that the mother's applications for the wardship proceedings to be dismissed on the grounds that there was no jurisdiction, were themselves to be dismissed. T remained a ward of court. The mother was ordered to return to England within 7 days. The mother was ordered to pay the costs of the father and the costs reserved on 24 May, 19 June and 7 August, but not to be enforced without leave until the financial proceedings between the parties were resolved either in London or in New York. The father's case is that the mother, on learning of that order, disappeared. The mother refutes that. The matter came back before Charles J on 30 August and the mother was ordered to return to this country by 4 September. The mother complied.
[18] On 19 September the mother issued an application for leave to remove T from the jurisdiction to reside in the USA and for interim leave to remove her to New York. That matter came before Kirkwood J on 1 December. The mother gave various

undertakings which involved her not taking T to New York and other undertakings that I need not recite. The mother was given permission to remove T from the jurisdiction for the purposes of a holiday in Florida between 27 December and 8 January 2001. In February 2001 the mother took T to Florida with the father's agreement to visit her sick mother. It was agreed that T would be returned by 19 February. With the father's agreement that was extended to 26 February, but come the 26th the mother and T failed to return to London. The matter came back in front of Coleridge J on 6 March, when he ordered T's immediate return to this country. That seems to have provoked the mother to have applied on 7 March 2001 to the courts in New York for custody of T. That application was, I am told, peremptorily dismissed.

[19] In March 2001 the father was driven to making an application under the Hague Convention on the Civil Aspects of International Child Abduction 1980 in the Florida courts for the return of T. This led to a hearing in Tampa, Florida on 27 and 28 March. An agreement in writing was arrived at, of which I have seen a copy. The significant parts of that agreement are as follows. It was agreed that T's country of habitual residence was the UK. It was agreed that T would not be permanently removed from the UK by either party without the other party's consent or court order. The mother agreed that she would not seek a court order to permanently remove T from England until 28 March 2006. That clause was to become null and void if the father permanently left the UK and relocated to another country. Another matter that was agreed between the parties was that the father would waive any and all claims to legal fees and costs arising from the legal proceedings, whether in Florida or in the UK. The level of financial support to T was agreed, as I have already set out. It was agreed that the parties would have shared parental

responsibility and that T would reside with the mother in the UK. Finally, so far as is relevant to this application, the father agreed to pay the mother £200,000 for the purpose of securing housing in the UK.

[20] The matter came back before Hogg J on 3 April 2001 when she made several orders, the gist of which was that the mother was ordered to return T by 5 April and her application for permission to remove T permanently was dismissed. On 10 April, by which time the mother was back in England with T, the matter again came back in front of Hogg J for the purposes of making within an English order the terms that had been agreed in writing by the parents in the USA. That is what happened.

[21] The only remaining dispute, therefore, at this stage was where in England T was going to be educated. On 8 June 2001 that matter came before me and I decided, having heard the evidence, that T was to attend G School with effect from the autumn term of 2001. That is where she went and that is where she has been ever since.

[22] Thereafter, the litigation between the parties was relatively – I emphasise the word relatively – quiescent, except for matters connecting to passports and contact, until the matter blew up again in the summer of 2002.

[23] There are other background matters which should be recorded. During the whole of this litigation, the father has retained the same solicitors and the same leading and junior counsel. By contrast, the mother has engaged the services of no less than eight different, and prestigious, firms of solicitors, three leading and two junior counsel. There has, as I have recited, been costs orders made against the mother in favour of the father. There have been no costs orders made against the father. The costs orders obtained by the father have been assessed at just under £21,000. The mother has not paid any of it to the father. Interest is being incurred at 8%.

[24] Furthermore, I was told by Miss Bangay during the course of her submissions that the father has incurred very considerable fees (the incredible figure of £500,000 was mentioned); the fees being referable to the litigation here and in the USA. It was those fees that the father apparently agreed to waive in the agreement to which I have referred. Furthermore, the mother was for a time legally aided. However, her legal aid certificate was revoked. I do not know how much the mother has spent on legal proceedings since the end of 1999 both here and in the USA, but it must run well, well

into six figures. The scale of the mother's expenditure can be gauged from her affidavit of 21 July 2003, at paras 8–10:

> 'As for the costs of the litigation hitherto, since the year 2000 I have incurred costs both in the US and here. Specifically in the United States I instructed AG and RF from New York, AK and BJ in Florida, and PS from Virginia and the total of their costs that I have paid was approximately US$170,230. In this country, I first instructed Farrer & Co. I paid fees to them of £10,000, with £5,000 still owing. [I] also instructed Dawson Cornwell during which time I ran up fees of some £80,000 of which nearly £15,000 was paid and £65,000 is outstanding. (I am being sued for this amount though it is subject to a substantial counterclaim in negligence.) I then instructed Fenwick & Co (off the record) and incurred fees there in the region of £1,750. I paid a significant proportion of these fees. Thereafter I instructed Withers from January 2001 until April 2001 and the costs I incurred with them
>
> [2004] 2 FLR 306
>
> totalled £86,000. These I have paid. I subsequently received a further demand from Withers for £34,675.38 which was disputed and has not been so far pursued.
>
> I then instructed Fisher Meredith for the first time from September 2001 through to January 2002 and was in receipt of a public funding certificate. It was discharged as a consequence of Mr W's objections to my public funding and a smear campaign concerning my lifestyle he orchestrated through the *Daily Mail*. Mr W and close friends of his at his instigation gave interviews to the *Daily Mail*. Eventually the Legal Services Commission deemed me ineligible on income because Mr W proceeded to pay maintenance through this period. The Legal Services Commission then decided to consider revoking my certificate. I wrote to the Lord Chancellor and complained about their conduct of the matter. Subsequently, there has been no substantive progress on the file for over a year now and it appears that the Legal Services Commission has shelved plans to revoke the certificate since they have taken no formal steps to do so. The costs during the period that I was legally aided have still not been paid to my solicitors because of delays in the system but total approximately £15,500. It cost me personally in excess of £6,000 in accountancy and other assistance to comply with the papers required as a result of the investigation by the Legal Services Commission but I had to do this to defend my position.
>
> After that I had to act in person. For a 2-week period I instructed Maxwell Batley and paid them fees in the region of £3,000. I also instructed Gordon Dadds on three separate short periods including an attendance at court and paid them fees in the region of £14,000. I also paid £3,000 to Raymond Tooth from Sears Tooth for advice.'

[25] I am told that the mother's affidavit in support of her applications due to be heard next March runs to no less than 158 pages with exhibits taking up five lever-arch files. By contrast, I am told that the father's affidavit is 22 pages in length with an exhibit of 35 pages.

[26] The figure of £146,000 sought by the mother to cover the costs from July 2003 to the final hearing in March 2004 is, in my judgment, truly colossal. The details are to be found in the exhibit to her affidavit. Her solicitors' costs (including VAT) are said to be in the region of £71,000; the estimated fee for one counsel, that is leading counsel, is, inclusive of VAT, £75,000.

[27] I will now set out as briefly as I can the means of the mother and the father. Mr Howard submits that they are relevant to the exercise of my discretion. I take the information about the mother's and the father's means from their Form Es made in the summer of 2003.

The mother

[28] She occupies the father's leasehold flat in Knightsbridge. The father pays the rent of £63,000 per annum. The mother has the right to reside for her life in C Mews and in a property in Florida. She has a total of £143,000 in bank accounts here and in the USA, of which £125,000 is in an account in the NatWest bank in Jersey and is the security for her overdraft with her bank. It is said that she is owed, from various sources including the father,

approximately £81,000. Her liabilities are said to amount to £395,000, of which the major components are £122,500 owed on overdraft to the bank; £80,200 to her mother in respect of loans; and £62,600 to Messrs Dawson Cornwell and £24,000 pounds to Messrs Withers, two of her previous firms of solicitors. It is to be noted that I was told by Mr Howard that in May 2003 her overdraft with the bank was £70,000. Now, in October, some 5 months later, it has risen to £130,000, the overdraft limit being £100,000.

[29] The mother receives £32,800 per annum periodical payments for T from the father and approximately £850 per annum child benefit. In the last 52 weeks prior to her Form E the mother received £60,000 from *Hello!* magazine, £50,000 from *Closer* magazine, £5,000 from GMTV, all in respect of giving interviews or writing articles about her breast cancer. She also received £50,000 from the *Daily Mail* as a result of a libel action. She also received £3,000 from a morning TV appearance. All those sums total £168,000.

[30] Mr Howard told me that the mother could not earn more money from the fact of her being a celebrity who had had breast cancer and who was now in remission. Mr Howard submitted, first, that she cannot obtain funding from the Legal Services Commission; secondly, she has no property to offer as security or in order to borrow to pay her anticipated legal fees; thirdly, the bank has indicated that it is not prepared to fund her legal fees on an unsecured basis; and, fourthly, if this application is refused, she will have to appear in person.

The father

[31] He owns the leasehold of a flat in Kensington worth £2.5m on which he has a mortgage of £1.25m with the Halifax Building Society. He owns two further leasehold properties in London and in Maine, USA, together worth £550,000. There are mortgages on both properties totalling £276,000. The father has £853,500 in bank accounts here and in the USA, of which £751,500 is in a current account in a Boston bank. He estimates his stocks are worth £325,500. Amongst other things he owns a helicopter worth £130,000 and his paintings he estimates are worth £500,000. His only debtor is the mother for his legal fees. His liabilities, he says, amount to £105,000, of which £60,000 are legal fees outstanding to his solicitors. There is potential capital gains tax on his American property, the two further leasehold properties in London and his paintings.

[32] As to income, his gross earned income for the last financial year he says was £221,000 or £137,000 net. His estimate for this year is very similar. He has investment income of £4,500 gross and rental income which produces £700 per week gross. At para 21 of his affidavit he estimates his current net income from all sources at £155,000 per annum. At para 22 he states that he pays periodical payments of £35,000 per annum for T, £63,000 rent on the Knightsbridge property where the mother and T live, and £7,700 by way of school fees, totalling in all £105,700 per annum.

Jurisdiction

[33] Mr Howard has submitted that the court has jurisdiction under s 15 of and Sch 1 to the Children Act 1989 to include in a periodical payments order for T an additional amount, over and above a sum strictly referable to her,

to cover the mother's anticipated and actual legal fees. The relevant parts of paras 1, 4 and 9 of Sch 1 provide:

'1 *Orders for financial relief against parents*

(1) On an application made by a parent or guardian of a child, or by any person in whose favour a residence order is in force with respect to a child, the court may—

(a) in the case of an application to the High Court or a county court, make one or more of the orders mentioned in sub-paragraph (2),

(2) The orders referred to in sub-paragraph (1) are—

(a) an order requiring either or both parents of a child—

(i) to make to the applicant for the benefit of the child; or
(ii) to make to the child himself,

such periodical payments, for such term, as may be specified in the order,

(b) an order requiring either or both parents of a child—

(i) to secure to the applicant for the benefit of the child; or
(ii) to secure to the child himself,

such periodical payments, for such term, as may be so specified,

(c) an order requiring either or both parents of the child—

(i) to pay to the applicant for the benefit of the child; or
(ii) to pay to the child himself,

such lump sum as may be so specified,

(d) an order requiring a settlement to be made for the benefit of the child, and to the satisfaction of the court, of property—

(i) to which either parent is entitled (either in possession or in reversion); and
(ii) which is specified in the order,

(e) an order requiring either or both parents of a child—

(i) to transfer to the applicant for the benefit of the child; or
(ii) to transfer to the child himself,

such property to which the parent is, or the parents are, entitled (either in possession or in reversion) as my be specified in the order.

(3) The powers conferred by this paragraph may be exercised at any time.

(4) An order under sub-paragraph (2)(a) or (b) may be varied or discharged by a subsequent order made on the application of any person by or to whom payments were required to be made under the previous order.

[2004] 2 FLR 309

(5) Where a court makes an order under this paragraph—

(a) It may at any time make a further such order under sub-paragraph (2)(a), (b) or (c) with respect to the child concerned if he has not reached the age of eighteen;

(b) it may not make more than one order under sub-paragraph (2)(d) or (e) against the same person in respect of the same child.

...

(7) Where a child is a ward of court, the court may exercise any of its powers under this Schedule even though no application has been made to it.

4 *Matters to which court is to have regard in making orders for financial relief*

(1) In deciding whether to exercise its powers under paragraph 1 or 2, and if so in what manner, the court shall have regard to all the circumstances including—

(a) the income, earning capacity, property and other financial resources which each person mentioned in sub-paragraph (4) has or is likely to have in the foreseeable future;

(b) the financial needs, obligations and responsibilities which each person mentioned in sub-paragraph (4) 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.

(2) In deciding whether to exercise its powers under paragraph 1 against a person who is not the mother or father of the child, and if so in what manner, the court shall in addition have regard to—

(a) whether that person had assumed responsibility for the maintenance of 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 person to maintain the child.

(3) Where the court makes an order under paragraph 1 against a person who is not the father of the child, it shall record in the order that the order is made on the basis that the person against whom the order is made is not the child's father.

(4) The persons mentioned in sub-paragraph (1) are—

(a) in relation to a decision to exercise its powers under paragraph 2, any parent of the child;

(b) in relation to a decision whether to exercise its powers under paragraph 2, the mother and father of the child;

[2004] 2 FLR 310

(c) the applicant for the order;

(d) any other person in whose favour the court proposes to make the order.

9 *Interim orders*

(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.

...

(3) An interim order made under this paragraph shall cease to have effect when the application is disposed of or, if earlier, on the date specified for the purposes of this paragraph in the interim order.'

[34] I summarise Mr Howard's submissions on the jurisdiction issue. The words in para 1(2)(a) – 'for the benefit of the child' – are wide enough to include monies payable

by the father for the mother's legal fees. The only limitation in these words are that the periodical payments must be for the benefit of the child, but they do not say that the periodical payments must be solely and/or exclusively for the benefit of the child. The words in para 1(2)(a) are wider than the word 'maintenance' in s 22 of the Matrimonial Causes Act 1973. Paragraph 4 of Sch 1 enjoins the court to consider 'all the circumstances' and thus gives the court a very wide discretion. 'All the circumstances' must include the desirability of funding litigation for a mother so that there is a fair hearing between the father and the mother in circumstances where there is gross inequality of financial power and where the litigation has enormous significance for the child.

[35] Mr Howard cited *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 WLR 865, [2003] 2 FLR 865. In that case the Court of Appeal substantially increased the sums awarded under Sch 1 to the mother against a very rich father in respect of a housing fund, internal decoration and periodical payments. In the course of his judgment Thorpe LJ reviewed *Haroutunian v Jennings* (1980) 1 FLR 62, *A v A (A Minor) (Financial Provision)* [1994] 1 FLR 657 and *J v C (Child: Financial Provision)* [1999] 1 FLR 152.

[36] In para [19] of his judgment, Thorpe LJ said that Mr Singleton, counsel for the mother in that case, had demonstrated that between 1989 and 2001 the percentage of children born out of wedlock had increased from 26% to 40%. Mr Howard also referred me to paras [42]–[44] and [48]–[49] of the judgment of Thorpe LJ and to para [81] of the judgment of Bodey J, which are as follows:

> '[42] First, in *A v A (A Minor) (Financial Provision)* [1994] 1 FLR 657, in explaining his quantification of an allowance for the mother's care, Ward J said at 665:
>
> > "I bear in mind a broad range of imprecise information from the extortionate demands (but excellent service) of Norland
> >
> > [2004] 2 FLR 311
> >
> > nannies, to au pair girls and mother's helps, from calculations in personal injury and fatal accident claims and from the notice-boards in the employment agencies I pass daily. I allow £8,000 under this head. It is almost certainly much less than the father would have to pay were he to be employing staff, but to allow more would be – or would be seen to be – paying maintenance to the former mistress who has no claim in her own right to be maintained."
>
> [43] I cannot agree with that reservation. I believe that a more generous approach to the calculation of the mother's allowance is not only permissible but also realistic. Nor would I have regard to calculations in either personal injury or fatal accident claims. It seems to me that such cross-references only risk to complicate what is an essentially broad-brush assessment to be taken by family judges with much expertise and experience in the specialist field of ancillary relief.
>
> [44] Secondly, in the passage which I have cited from the judgment of Hale J in *J v C (Child: Financial Provision)* [1999] 1 FLR 152, in which she rightly sets the welfare of the child to be clearly embraced within the court's general duty to "have regard to all the circumstances", I would only wish to amplify by saying that welfare must be not just "one of the relevant circumstances" but, in the generality of cases, a constant influence on the discretionary outcome. I say that because the purpose of the statutory exercise is to ensure for the child of parents who have never married and who have become alienated and combative, support and also protection against adult irresponsibility and selfishness, at least as money and property can achieve those ends.
>
> ...
>
> [48] In making this broad assessment how should the judge approach the

mother's allowance, perhaps the most emotive element in the periodical assessment? The respondent will often accept with equanimity elements within the claim that are incapable of benefiting the applicant (for instance school fees or children's clothing) but payments which the respondent may see as more for the benefit of the applicant than the child are likely to be bitterly resisted. Thus there is an inevitable tension between the two propositions, both correct in law, first that the applicant has no personal entitlement, secondly, that she is entitled to an allowance as the child's primary carer. Balancing this tension may be difficult in individual cases. In my judgment, the mother's entitlement to an allowance as the primary carer (an expression which I stress) may be checked but not diminished by the absence of any direct claim in law.

[49] Thus, in my judgment, the court must recognise the responsibility, and often the sacrifice, of the unmarried parent (generally the mother) who is to be the primary carer for the child, perhaps the exclusive carer if the absent parent dissociates from the child. In order to discharge this responsibility the carer must have control of a budget that reflects her position and the position of the father, both social and financial. On the one hand she should not be burdened with unnecessary financial anxiety or have to resort to

[2004] 2 FLR 312

parsimony when the other parent chooses to live lavishly. On the other hand whatever is provided is there to be spent at the expiration of the year for which it is provided. There can be no slack to enable the recipient to fund a pension or an endowment policy or otherwise to put money away for a rainy day. In some cases it may be appropriate for the court to expect the mother to keep relatively detailed accounts of her outgoings and expenditure in the first and then in succeeding years of receipt. Such evidence would obviously be highly relevant to the determination of any application for either upward or downward variation.'

At para [81] Bodey J said:

'There will equally and inevitably be numerous grey areas where the need asserted is of no direct benefit to the child, but is (or is arguably) of legitimate indirect benefit in helping reasonably to sustain the mother's physical/emotional welfare. This will be most pronounced when the father is very wealthy and able without difficulty to provide for living costs of no clearly identifiable direct benefit to the child, but which would indirectly promote the mother's care of the child by allowing her such a lifestyle as not to feel "out of place" in the society of the parents of the child's friends.'

[37] Mr Howard submitted that *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865 demonstrated a definite shift in judicial thinking. Schedule 1 is to be interpreted liberally. There was nothing in *Re P* which casts doubt on the court assuming jurisdiction to make the order for periodical payments which the mother in the instant case seeks. Mr Howard submitted that there is support for his submissions in *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 WLR 605, [2001] 1 FLR 377 and *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71. In particular, in *A v A* he drew my attention to the following passage in the judgment of Holman J at 609 and 381, 382 respectively:

'In my judgment, however, neither the quoted passage of Browne-Wilkinson J in *Re Dennis (Deceased)* [1981] 2 All ER 140, nor any other of the authorities which I have just mentioned, exclude the possibility that "maintenance" is wide enough to include a current need to pay legal costs. Certainly, costs are, during the progress of a piece of litigation, "recurring expenses", and they are for most people "expenses of an income nature". They may fall outside the phrase "daily living" on one view of those words. But the statute itself uses the word

"maintenance" and, in my view, that word is not restricted to "daily living" in its most literal and restrictive sense.

There is no doubt that in all sorts of ways "maintenance" does extend to, and orders for maintenance pending suit have for many years been intended to cover, matters which are not ones of "daily living". Provision may be included, if there has been a history of it, to enable the payee to make charitable payments or payments to a third party, such as a dependent parent. Such payments are not part of the "living" expenses of the payee at all, but may be a component of the

[2004] 2 FLR 313

order. Further, provision can clearly be made to cover legal costs as such – for example, if the payee has a current need to fund litigation with a third party; for example, a landlord trying to obtain possession of the home.

But Mr Singleton submits that the costs of the suit itself are in a different category. I do not agree. Just at the moment they are, after the provision of a roof over her head and food in her mouth, the wife's most urgent and pressing need and expense. She could manage without holidays, though I have made some provision for them. She could no doubt manage for a while without buying new clothes. She could manage without her manicures, pedicures and yoga and keep fit classes, for all of which I have, on the facts of this case, made provision. She could even manage without the provision for forms of private medical care (to which the family has been accustomed) for, if necessary, she could fall back on the NHS. But she simply cannot make progress with the dominating issue in her life if she cannot pay her lawyers, and for this the state will not provide.'

[38] Mr Howard submitted that that passage encapsulated his submissions on behalf of the mother. As to *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71, the essential reasoning of Charles J is to be found between paras [41] and [64] inclusive which I have read. Having reviewed the legislative history of s 22 of the Matrimonial Causes Act 1973, he came to the same view as Holman J.

[39] Alternatively, Mr Howard submitted that, if Sch 1 does not give the court jurisdiction, then, as T is a ward of court, the inherent jurisdiction of the High Court did give the court such jurisdiction. The court's duty is to protect T and take care of her interests. It is thus necessary, it was submitted, that the order sought is made so that T's future can be determined at the final hearing. In this connection Mr Howard drew my attention to *Calderdale Borough Council v H and P* [1991] 1 FLR 461. The deputy High Court judge decided that he had an inherent jurisdiction to order the local authority to pay maintenance to the grandparents of four children who were made wards of court in proceedings instituted by the local authority. During the course of his judgment he said at 467F and G:

'So how can a local authority institute care proceedings in the first place, then come to the court and ask for the children to be made wards of court, and a local authority whose responsibility to maintain the children would become if the grandparents were to repudiate their present position or became unable – let us face it – through bankruptcy to look after the children, how can the local authority say, "Well, this is what we want you to do but we won't pay"? How can I give efficacy to their own application in those circumstances unless I have an inherent jurisdiction in wardship to make the order for which the local authority itself is asking work, and to make it work then I have to make somebody pay, and they are the only people in a position to pay. So it seems to me on that basis, and relying on Comyn J, and relying also on Lord Wilberforce, I believe in the circumstances of this case I have such an inherent jurisdiction.'

[2004] 2 FLR 314

[40] Miss Bangay submitted that the court had no jurisdiction, statutory or inherent,

to make the order the mother seeks. It is clearly the intention of Parliament that the Child Support Act 1991 (where applicable), the Matrimonial Causes Act 1973 and the Children Act 1989 provide comprehensive codes in respect of financial support for children. The court's jurisdiction is wholly statutory and there is no room to invoke any inherent jurisdiction. Section 15 of the Children Act 1989 summarises its own history. It expressly declares that Sch 1 consists primarily of the re-enactment of part of the Family Law Reform Act 1969, the Guardianship of Minors Acts 1971 and 1973, the Children Act 1975, and part of the Family Law Reform Act 1987. Section 15 declares that Sch 1 'makes provision for the financial relief for children'. Thus no novel development in relation to the financial provision for children was intended.

[41] The terminology of s 15 and Sch 1(1) differs markedly, it was submitted, from that of s 22 of the Matrimonial Causes Act 1973, and, therefore, should be interpreted differently. *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 WLR 605, [2001] 1 FLR 377 and *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71 have no relevance in interpreting Sch 1. The language in s 15 and Sch 1(1) is wholly different from s 22 of the Matrimonial Causes Act 1973, which speaks of maintenance (pending suit) between two spouses mutually obliged to maintain each other by the act of marriage.

[42] The focus, it is further submitted, of Sch 1 is directly on the child. The parent may be the recipient of payments which are for the benefit of the child. Inter-parent litigation, either in its inception or prosecution, is not for the benefit of the child. The parent who seeks an upfront payment of her litigation costs is seeking a benefit for herself and in her own capacity and not for the child.

[43] *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865, it was submitted, is of no assistance on the issue of jurisdiction, since it is concerned with, not the legal costs of the mother, but the approach of the court to the assessment of quantum to be awarded in respect of a housing fund, internal decoration and periodical payments for the child, in order to permit the child to enjoy a reasonable standard of living given the vast scale of the father's fortune. As Thorpe LJ said at para [51]:

> 'I accept the validity of Mr Singleton's over-arching submission that the dominant feature in the present case is the scale of the father's fortune and of his chosen way of life.'

Overall, the issue in that case was concerned with the nature of the 'carer's allowance'. The decision was limited to the issue of that allowance.

[44] As to *A v A (Maintenance Pending Suit: Provision for Legal Fees)* and *G v G (Maintenance Pending Suit: Costs)*, Miss Bangay submitted that the essence of both decisions is the interpretation of 'maintenance' under s 22 of the Matrimonial Causes Act 1973, ie in the context of one spouse against the other. These authorities are wholly specific to s 22 and have no wider application.

[45] In my judgment, the issue whether or not the court has jurisdiction is determined by a proper construction of s 15 and Sch 1. I do not find the cases of *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1

WLR 605, [2001] 1 FLR 377 or *G v G (Maintenance Pending Suit: Costs)* [2002] EWHC 306 (Fam), [2003] 2 FLR 71 to be of assistance. They are concerned with a different situation under a different statute. Nor do I find in *Re P (Child: Financial Provision)* [2003] EWCA Civ 837, [2003] 2 FLR 865 support for Mr Howard's submissions. That is in no way surprising since the case did not deal with the issue before me, but it does support the submission of Miss Bangay in this respect, namely that, when the court considers the rival budgets of the mother and the father, it must be vigilant to guard against unreasonable claims made on the child's behalf but with the disguised element of providing for the mother's benefit rather than for the child. I refer in particular to paras [48] and [49], which I have already set out, and to para [76](v) in the judgment of Bodey J where he said:

'However, as this latter concept lends itself to demands going potentially far wider than those reasonably necessary to enable the mother properly to support the child "one has to guard against unreasonable claims made on the child's behalf but with the disguised element of providing for the mother's benefit rather than for the child": *J v C (Child: Financial Provision)* [1999] 1 FLR 152, 159.'

[46] In my judgment, Miss Bangay 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 sums of money 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.

[47] 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 best 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 in order to pay her legal expenses.

[48] Thus, in my judgment, the court has no jurisdiction under Sch 1. Neither do I believe that there is such a jurisdiction under the inherent jurisdiction. In my judgment, *Calderdale Borough Council v H and P* [1991] 1 FLR 461 is an illustration of the powers available in wardship, but it is no more than that. I am not persuaded that there is such a power in wardship to do what the mother wants. 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 her application before me, in my judgment it would be a misuse of wardship powers to invoke such a power for the reasons that I have advanced in relation to the lack of jurisdiction under Sch 1.

[2004] 2 FLR 316

[49] Accordingly I find that the court has no jurisdiction, and on that ground the mother's application must be dismissed.

Discretion

[50] Strictly speaking, it is not necessary for me to express my views as to how I would have exercised my discretion if I am wrong and the court does have jurisdiction. But the matter was fully argued before me and in the circumstances of the case I ought to express my opinion. I must apply the criteria set out in para 4 of Sch 1 to this very unusual case.

[51] I must look at all the circumstances of the case. The mother in effect wants the father to subsidise her litigation against him. In such circumstances, I do not think it right to shut out from my consideration what has happened in the past. To put it mildly, the mother has plainly not conducted herself or the litigation always in T's best interests. The father has had to meet several, what I would describe as tactical, manoeuvres by the mother and at considerable expense to himself. The court's displeasure at the behaviour of the mother has been expressed on several occasions by the award of the father's costs against her. This is unusual in children cases where the usual order is no order for costs (see *Gojkovic v Gojkovic and Another* [1992] Fam 40, [1991] 2 FLR 233, in particular in the judgment of Butler-Sloss LJ (as she then was) at 57C/60C and 236 respectively), and is only generally ordered where the conduct of a

party has been reprehensible or his stance in the litigation has been beyond what is reasonable (see per Wilson J in *Keller v Keller and Legal Aid Board* [1995] 1 FLR 259 at 265C).

[52] In 2001 the mother signed an agreement and submitted to the order of Hogg J in April 2001, both of which were plainly intended to put an end to the litigation between T's parents. What is said to have changed since that hearing is that, arising out of her illness in 2002, the mother's case is that she wants to go 'home', ie to Florida, to live with her mother in Florida at least in the medium term and that she will receive better medical treatment in the USA. However, it is a fact that the mother, now 47 years old, has lived in England since she was 14, albeit she has regularly visited the USA, and her mother, it is said, comes fairly often to England. Furthermore, I have been shown a letter dated June 2003 from Professor P, Emeritus Professor of Breast Oncology, that there is no evidence of active cancer and no further treatment is indicated at this time.

[53] I have already outlined the mother's financial circumstances and how T is provided for. It is, therefore, instructive to look to see what are the financial claims the mother is making in this latest bout of litigation. I take it from her Form E. The mother seeks a capital sum of £2,137,830 of which £2,100,000 is referable to housing and furnishing. The mother's budget is put at £17,000 per month, ie £11,000 per month for T and £6,000 for herself. What the mother is presumably seeking by way of periodical payments for T must be a minimum of £132,000 per annum and a maximum of £204,000 per annum. Included in these figures is an annualised sum of £18,800 for a nanny and £32,484 to cover a photographic assistant, a secretary, a book-keeper, an accountant and a paralegal secretary.

[54] If the mother is successful in obtaining permission to remove T permanently from the jurisdiction to Florida, she intends to live, in the medium term, in the submission of Mr Howard, with her mother. In the longer

term she may wish to buy her own property. However, para 14(1) of Sch 1 states as follows:

> 'Where one parent of a child lives in England and Wales and the child lives outside England and Wales with—
>
> (a) another parent of his;
> (b) a guardian of his; or
> (c) a person in whose favour a residence order is in force with respect to the child,
>
> the court shall have power, on an application made by any of the persons mentioned in paragraphs (a) to (c), to make one or both of the orders mentioned in paragraph 1(2)(a) and (b) against the parent living in England and Wales.'

[55] Thus, technically it may be that as at March 2004 the court would be able to award a lump sum, but it may be a powerful circumstance (a) that there is no immediate need for the mother to have capital to house herself and T in Florida and (b) once the mother moves to Florida and lives there, the court, it seems, cannot award a lump sum.

[56] If the mother is unsuccessful and yet retains the residence of T in London, then she has the right to reside at C Mews. The settlement in 2001 provided for the father to pay the mother a lump sum of £200,000 to enable her to do up C Mews. She chose, as I understand it, to live at the flat in Knightsbridge and the father has, therefore, paid the rent of £63,000 per annum by notionally using the lump sum due under the agreement of £200,000. It is to be noted that neither the settlement agreement nor Hogg J's order of 10 April 2001 obliged the father to pay rent to enable the mother to live at the flat. If the father succeeds in his application for residence, then the Sch 1 claim falls away.

[57] Theoretically, I accept that the mother can apply for a lump sum, but in the light of what I have set out, in my judgment, her claim for a lump sum could charitably be described as very precarious. As to periodical payments, I pose the question, what has changed since the settlement of 2001 to trigger an increase in T's periodical payments other than inflation and the fact that children get more expensive as they got older? Mr Howard said that one of the mother's reasons for wishing to live in Florida is that the cost of living is cheaper in Florida than in London. No doubt that may be correct, but that hardly founds a claim for an increase in the level of periodical payments. If the father succeeds in his residence application, the need for him to pay periodical payments to the mother is either extinguished or very substantially reduced.

[58] What is the explanation, so says Miss Bangay, for the mother putting in her budget £18,800 per annum for a nanny for T and/or £32,484 per annum for staff, as I have described, unless either she is now working (as the father suspects) or that she intends to work? Furthermore, the mother has said at 2.20 of her Form E that in the year 2000 she made a profit of £16,000 from her work, a loss of £15,800 in 2001 and a net income of £54,913 for 2002. Under 2.23 the mother gave details 'of any other income received in the last 52 weeks': 2002, receipts totalling £170,000. The mother now says that the figure of £54,913 in 2.20 is a mistake. It is in fact part of the figures in 2.23.

[2004] 2 FLR 318

However, given that the mother has claimed 15 hours at £180 per hour, ie £2,700, as being the cost of her present solicitor preparing the Form E, it is a little difficult to understand how such a basic mistake, if mistake it is, has been made.

[59] The reality of the mother's application to be heard by Hogg J next March, shorn of the gross exaggeration and hype, is that there is little, if any, substance in the mother's financial claims. The real issue is whether T should live with the mother either in Florida or in London, or with the father in London. That will entail a consideration of what is in T's best interests and thus whether the mother's plan to go to Florida or to live with T in London, now that she is in remission, or the father's plan that T should live with him, is the better for her.

[60] I do not believe that the real dispute in this case can possibly cost the mother £146,000 or anything like it. How much a sensibly conducted case would actually cost the mother is very difficult to estimate because I have no evidence or information. But, doing the best I can from my experience of other cases in this field, I hazard an opinion that £30,000, exclusive of VAT, would not be too wide of the mark.

[61] I recognise the burden, sometimes enormous, that a litigant in person has to bear. I also recognise that the mother, albeit in remission, would be under an extra burden if she had to conduct her own case. Mr Howard drew my attention to a passage in the judgment of Holman J in *A v A (Maintenance Pending Suit: Provision for Legal Fees)* [2001] 1 WLR 605, [2001] 1 FLR 377 at 614 and 386 respectively, in which he said:

> 'Mr Posnansky relied, too, on the right of a wife to a fair trial under Art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and in particular the jurisprudence as to equality of arms. He cited *Dombo Beheer v The Netherlands* [1993] 18 EHRR 213, in which (in a very different context) the court said, at para 33 on 229:
>
> > "It is clear that the requirement of 'equality of arms', in the sense of a 'fair balance' between the parties, applies in principle to such cases [ie cases concerning civil rights and obligations] as well as to criminal cases ...
> >
> > The court agrees with the Commission that as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case - including his evidence – under conditions that do not place him as a substantial disadvantage vis-à-vis his opponent."

In the earlier case of *Airey v Ireland* [1979] 2 EHRR 305, the court had held that there has to be a practical and an effective right to a fair trial and that in complex matrimonial litigation (as in *Airey*, and most certainly as in the present case) the theoretical possibility of appearing in person does not guarantee that right.

I would have reached the same conclusion in this case without regard to the Human Rights Act 1998 or the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 or this jurisprudence. Nevertheless, they do fortify me in my decision that

[2004] 2 FLR 319

in this case I should indeed exercise my discretion so as to include in the maintenance suit an element which the wife can pay towards her costs.'

[62] I also take into account that the mother is not a person who knows nothing of litigation in this field. Far from it. She has been locked in litigation with the father since late 1999 or the beginning of 2000. She has attended many hearings. She has seen how it is done. She is not a novice, and I am satisfied that she is highly intelligent and articulate.

[63] Where and with whom T lives and is brought up is, I recognise, of enormous importance for T's well-being. This point must have considerable weight, but it must also be seen in the context of the agreement struck in 2001.

[64] I am prepared to accept that the mother will not be able to borrow on an unsecured basis from the bank. Nor does she apparently have any property to offer as security. Public funding may be a closed book. However, Miss Bangay has placed great emphasis on the mother's earning capacity. She has turned her illness to her advantage and made sizeable sums of money from the media. Mr Howard submitted that this source of income has, or may have, dried up. The award of libel damages is a one-off. Nevertheless, I remain suspicious when it is suggested that the mother has no earning capacity. Furthermore, it would appear that she has been able to maintain a reasonably high standard of living. Indeed, she has even been able to persuade the bank to increase her overdraft from £70,000 in May 2003, past the limit of £100,000 up to £130,000 in this October.

[65] The father is well able to afford the sum of £30,000. He could pay that without the slightest difficulty. He has very large bank balances indeed. If I grant the mother's application, I recognise that, if at the end of the final hearing there is no order for costs, the possibility of the mother repaying £30,000 to the father is, on her own case of impecuniosity, somewhat unlikely. Thus in reality it may be that the mother may well be in the position as if a costs order had been made in her favour.

[66] Taking all the matters into account, in my judgment, I should not exercise discretion in favour of the mother. After prolonged litigation the mother and the father settled their differences in 2001, not just by an agreement but by the order of Hogg J. As part of that agreement, the mother said that she would not apply to the court to remove T permanently from the jurisdiction until March 2006. She has used up in the litigation since late 1999/early 2000 a substantial amount of her resources in legal costs, pursuing fruitless litigation, particularly in the USA, and pursuing or resisting applications in England, in some of which her conduct has been condemned as unreasonable. On the information I have, the prospects of success for the mother's financial claims as to capital, either on their own or in the light of the history of this matter, appear to be, as I have said, very precarious. If the mother is pursuing a substantial increase in T's periodical payments based on the budgets in her Form E, these appear to be, in my judgment, wildly excessive. If £32,700 per annum was reasonable in 2001, apart from inflation and T getting older, there appears to be very little to justify an increase.

[67] As to her application to remove T to Florida, all I need say is I have my doubts about the prospect of success in this application. As to the father's application for residence, I suspect that this is more in reality a defensive rather than an offensive application.

[68] Finally, I am not satisfied that the mother has so little prospect of raising the necessary finance I have indicated, ie £30,000, to prosecute her applications, that it would be just to order the father, albeit a wealthy man, to fund her legal costs.

Application dismissed.

Solicitors: *Fisher Meredith* for the applicant mother
Levison Meltzer Pigott for the respondent father

ALISON PERRY
Law Reporter