

MG and JG v JF

[2015] EWHC 564 (Fam)

10/03/2015

Barristers

Sam King KC

Court

High Court Family Division

Practice Areas

Public Children Law

Summary

Application for a costs allowance under Schedule 1 to the Children Act 1989 to fund representation and experts fees in a private children dispute. Application granted.

Facts

In private law proceedings in respect of JFG, aged 7, the applicants applied for a costs allowance to be paid by the respondent under Schedule 1 to the Children Act 1989.

JG and MG were women in a civil partnership (though during proceedings they separated and the civil partnership dissolved) who arranged to have a child with JF. The parties had lengthy discussions about the arrangement and entered into a legal agreement. JFG lived with JG and MG and had contact with JF. In 2012, the relationship between the mothers and the father broke down and serious difficulties began to arise in contact, which then broke down entirely.

Proceedings were issued to address contact and specific issues about education and health. Reports by an educational psychologist and a psychologist were directed, which recommended a programme of supervised, facilitated contact to restore the relationship between father and son and other therapeutic work. The parties agreed a lengthy and detailed consent order to set up the managed contact. A further hearing and a final hearing were listed, though it was hoped that a final order could be made at the next hearing.

MG and JG had instructed counsel on a Direct Access basis and increased the mortgage on their property by £20,000 to pay costs; however, counsel and experts were still owed fees. JF was of reasonable means and also engaged Direct Access counsel, whilst the child was represented under a legal aid certificate.

Legal aid

Mostyn J noted that had legal aid for private children proceedings not been removed by LASPO 2012, MG and JG would have been entitled to legal aid; however, as no legal aid was available, they sought for JF to fund their representation. Mostyn J noted that had they been in receipt of legal aid or been of means, it

is “inconceivable” that JF would be ordered to pay their costs, as there was no reprehensible behaviour or unreasonable stance.

In this case, it was impossible for MG and JG to be expected to represent themselves having regard to the factual and legal issues. There would be a gross inequality of arms and arguably a violation of their rights under Articles 6 and 8 of the ECHR and Article 47 of the ECFR. Whilst JF has not behaved reprehensibly or unreasonably, he is the only realistic source of costs funding, subject to a contribution from MG and JG from their modest resources.

Mostyn J noted that some may say this is grossly unjust, but the situation has arisen due to the removal of private law from the scope of legal aid and the difficulties in securing exceptional funding. He listed the increasing number of complex cases where the absence of legal aid has been criticised by the judiciary. Based on these decisions, “in the field of private children law the principle of individual justice has had to be sacrificed on the altar of public debt”.

Costs funding principles

Although MG and JG were not entitled to an order for costs, they were entitled to seek an order for costs funding. The following principles were engaged:

- i. the subject matter of the application is centrally relevant and the applicants’ stance in proceedings is reasonable;
- ii. there are recognised advantages flowing from competent representation and from an equality of arms;
- iii. the court cannot make an order unless it is satisfied that the applicant would not reasonably be able to obtain appropriate legal services for the proceedings. A costs allowance should only be awarded to cover historic unpaid costs if the court is satisfied that the applicant will not reasonably be able to obtain in the future appropriate legal services for the proceedings; and
- iv. in determining whether the applicant can reasonably obtain funding from another source, the court would be unlikely to expect her to sell or charge her home or deplete a modest fund of savings.

Held

Application to this case

MG and JG owed fees to counsel and the experts and sought payment of counsel’s fees for the next hearing. Funding was not sought for the final hearing, as this would be considered at the next hearing if necessary. They also sought to not contribute to future expert evidence or therapeutic work.

Mostyn J concluded that JF should pay 80% of MG and JG’s claims and 80% of therapeutic work (with MG and JG each contributing 10%). MG and JG could not reasonably or realistically be expected to find more and the judge was satisfied that JF could, without undue hardship, find the share he had been shouldered with. Whilst it could be said that it is “grossly unfair” for JF to have to pay over £20,000 plus 80% of future therapeutic costs, it was noted that this is the position that the government has left him in and “it is a sorry state of affairs”. As to the costs of further expert evidence (it being necessary to ask further questions of the educational psychologist), this should be paid for by JFG and the fees are a reasonable charge on his public funding certificate. It was just and reasonable, whether or not JFG is legally aided, because the fees were being incurred primarily for his benefit.

Permission

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