

## CF v KM (2010)

**[2010] EWHC 1754 (Fam); [2011] 1 FLR 208**

13/07/2010

### **Barristers**

Mark Johnstone

### **Court**

Family Division

### **Practice Areas**

Private Children Law

### **Summary**

Courts had jurisdiction under the Children Act 1989 Sch.1 para.1(2)(c) to order a lump sum payment to contribute to the costs of a claim under Sch.1 and to the costs of proceedings under s.8 during the course of the proceedings.

### **Facts**

The appellant mother (M) appealed against a decision to dismiss her application under the Children Act 1989 Sch.1 for a lump sum payment for the benefit of her daughter to meet or contribute to the costs of a claim under Sch.1 and proceedings under s.8. The district judge had dismissed M's application on the basis that the court had no jurisdiction to make the order because that was precluded by the Child Support Act 1991 s.8(1) and s.8(2) where a maintenance calculation that was below the maximum assessment was in place. M argued that the court (1) had power to order the payment sought under Sch.1 para.1(2)(c) to the 1989 Act because Sch.1 para.1(3) provided that orders under Sch.1 para.1(2) could be made at any time after a claim under Sch.1 had been issued, therefore including before it had been determined; (2) should use its discretion to make the order.

### **Held**

HELD: (1) The natural reading of the interplay between Sch.1 para.1 and Sch.1 para.9 was that Sch.1 para.1 focused on orders made on the disposal of a Sch.1 claim at a final hearing and on future orders if earlier orders were revisited, while Sch.1 para.9 focused on orders made during the Sch.1 proceedings. In the absence of Sch.1 para.9, Sch.1 para.1(3) could be interpreted as conferring power to make orders leading up to a substantive hearing, or as enabling the court to order periodical payments, or a lump sum, on the basis that a further payment could be ordered and that such an order disposed of the claim. The centre of the argument was therefore whether those jurisdictional bases were excluded either by Sch.1 para.9 or the underlying purposes of the relevant legislation. A purposive approach strongly supported the view that, without expressly doing so, Parliament would not have intended to restrict the jurisdiction of the court to making a lump sum order only on the final determination of all aspects of a Sch.1 claim. Such an intention would run counter to the central underlying purpose of Sch.1, to enable

the court to provide fair and appropriate financial support for the benefit of a child. That approach therefore supported the proposed jurisdictional bases, as did a linguistic approach based on the natural reading of the provisions, *S (A Child) (Financial Provision)*, Re (2004) EWCA Civ 1685, (2005) Fam 316 applied. Further, the discretion to make a lump sum order in respect of costs did not circumvent the underlying purpose of the 1991 Act. (2) The existence of the discretionary jurisdiction did not mean that it would be exercised, *NMT v MOT* (2006) EWHC 2494 (Fam), (2007) 2 FLR 925 applied. It was important to remember that the exercise of the power could cause considerable unfairness to the payer because he would fund both sides of the case, and ran the risk of never recouping either set of costs. The approach taken under the Matrimonial Causes Act 1973 to ordering payment in respect of the other side's costs was helpful by analogy, *Currey v Currey* (2006) EWCA Civ 1338, (2007) 2 Costs LR 227, *Moses-Taiga v Taiga* (2005) EWCA Civ 1013, (2006) 1 FLR 1074 and *TL v ML* (Ancillary Relief: Claim against Assets of Extended Family) (2005) EWHC 2860 (Fam), (2006) 1 FLR 1263 considered. However, the different nature of proceedings under Sch.1, including the probably higher risk of non-recoupment, had to be remembered. The prospects of recoupment had to be evaluated, particularly if there was a risk that the applicant would seek to exaggerate a claim on the child's behalf, or if there was a risk that recoupment would be likely to significantly undermine the effect of an order for financial provision. The information before the court indicated that M had reasonably good prospects of obtaining an appropriate order, so could not be said to be pursuing an exaggerated claim, and there was a realistic prospect that costs could be recouped. It was more likely than not that it would benefit the child if M was represented in both the Sch.1 and s.8 proceedings: there were advantages flowing from competent representation, and from equality of arms in both investigatory and adversarial processes, *NMT v MOT* and *G v G* Unreported April 8, 2009 Fam Div applied.

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