

## The new legal services payments order: how to obtain an order for one party to fund the other's legal fees

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Most of the provisions of the Legal Aid Sentencing and Punishment of Offenders Act (LASPO) 2012 were brought into force on 1 April 2013. On 27 March 2013, the government made the 7th commencement order, bringing ss 49 to 54 of the 2012 Act into force on 1 April 2013. This was not published until 8 April 2013! After some uncertainty, the new powers for the court to order one party to make a payment to fund the other's lawyers are therefore now in force.

### The new powers

Under new s 22ZA of the 1973 Act, the court will be able to order 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. Such an order – which I have termed a legal services payment order or LSPO – may be made:

- in proceedings for divorce, nullity or judicial separation proceedings to enable the applicant to obtain legal services for the purpose of the proceedings (!) or
- in proceedings under Part II of the 1973 Act for financial relief in connection with proceedings for divorce, nullity etc. 'Financial relief' is not defined in Part II of the 1973 Act, although Part II is entitled 'Financial relief for parties to marriage and children to family'. It might be assumed that a LSPO will be available to enable the applicant to fund any application under Part II that is made in connection with divorce etc proceedings. Most financial remedies applications will be covered, but of course a Schedule 1 application, a claim under Part III of the 1984 Act, and a failure to maintain claim under s 27 would appear to be outside the scope of a LSPO.

### A LSPO may:

- be for a single amount to be paid by the Respondent ('R') to the Applicant ('A')
- provide for the payment of all or part by instalments
- provide for any such instalments to be secured
- allow for all or part of the sum ordered to be deferred
- be for any type of allowable legal services or limited to allow A to obtain legal services of a specified description
- be for legal services to be provided over any period or for only such services to be provided in a specified period (eg between now and 1 July 2013)
- be for the whole proceedings or for the purposes of a specified part of the proceedings (eg between now and FDR)
- be varied in the event of a significant change in circumstances since it was made

Payment for what exactly?

For what services can LSPO's be obtained to cover? 'Legal services' is defined in s 22ZA(10) to mean the following types of services:

- advice as to how the law applies in the particular circumstances,
- advice and assistance in relation to the proceedings
- providing other advice and assistance in relation to the settlement or other resolution of the dispute
- providing advice and assistance in relation to enforcement of decisions in the proceedings or as part of the settlement or resolution of the dispute

and they include, 'advice and assistance in the form of representation and any form of dispute resolution, including mediation.' It is not clear whether this covers the fee charged by a mediator or arbitrator, but it does cover legal advice provided by a professional McKenzie friend – ie the legal services need not be supplied by a lawyer!

The court's decision making process on an application for a LSPO

There is a checklist of factors to be considered in new s 22ZB(1):

- (a) income, earning capacity (including any increase in earning capacity which it would be reasonable to expect the person to take steps to acquire) property and other financial resources which each party has or is likely to have in the foreseeable future
- (b) financial needs obligations and responsibilities which each 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 respondent 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 A to R in respect of the costs of proceedings or other proceedings to which they are or were both parties
- (h) the effect of the order (or its variation) on R, and in particular, whether the order would be likely to cause undue hardship to R or prevent R from obtaining legal services for the purposes of the proceedings

However, A must surmount the hurdles in s 22ZA(3) and (4) before the court may make a LSPO in her favour. The court must be satisfied that:

- without the amount, A would not reasonably be able to obtain appropriate legal services for the purposes of the proceedings or any part of the proceedings.
- A is not reasonably able to secure a loan to pay for the services
- A is unlikely to be able to obtain the services by granting a charge over any assets recovered in the proceedings.

On the face of it, this does cause A some difficulties in proving a negative. A sensible interpretation would be to follow the dictum of Nicholas Mostyn QC in *TL v ML and Others (Ancillary Relief: Claim Against Assets of Extended Family)* [2005] EWHC 2860 (Fam) [2006] 1 FLR 1263, at para 129, where he said "In order to prove the inability to raise a litigation loan, I would have thought that production of correspondence between her solicitors and at least two banks eliciting a negative response would suffice. A simple statement from her solicitors stating that they were not prepared to enter into a *Sears Tooth v Payne Hicks Beach* charge should ordinarily deal with the third requirement."

How to make the application

In advance of the FPR 2010 being amended, this is necessarily speculative, but unless a new form is devised, it might be expected that the application is made by form D11 under Part 18 of the FPR with a statement in support. In financial remedy proceedings, it might be included as an 'interim order' within rule 9.7.

What about the costs of the costs? It is unlikely that the application for a lspo will be treated as 'financial remedy proceedings' for the purposes of FPR r 28.3. If that is right:

- the 'no order as to costs' rule will not apply. The court will have a 'blank sheet' in front of it, which will often lead to the result that the 'winner' should get their costs;
- the 'only an open offer is admissible on costs' rule will also not apply. R will be able to make a Calderbank offer to attempt to protect his position on costs.

Scope of legal services payments order

No more costs allowances in mps orders

The new remedy, when introduced, is intended to be the exclusive method of providing for one party to fund the other's costs of the main suit and financial remedy proceedings in connection with the main suit. New s 22(2) of the 1973 Act prevents the inclusion of a costs allowance in an order for maintenance pending suit: a mps order '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.'

However, an order for interim pp's under s 23(1)(a) is not subject to the same restriction. So, once decree nisi has been obtained, an order for interim pp's may contain a costs allowance in the current manner.

In addition, a costs allowance is still permissible:

- by way of interim pp's in a claim under Part III of the MFPA 1984;
- by way of interim pp's (assuming there is jurisdiction) in a claim under Schedule 1 to the Children Act 1989;
- by way of an 'interim lump sum' in a claim under Schedule 1 to the Children Act 1989.

Conclusion

Costs allowances in orders for maintenance pending suit were of course confined to those cases where the respondent's income was sufficiently large to fund the applicant's legal fees. Now any party with free capital may find themselves on the receiving end of an application for a lspo (or the threat of one) where the other party has difficulty meeting their legal fees from their own resources.