



Non-Court dispute resolution and cost-proportionate litigation

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The recent decision in WL and HL (Rev 1) [2021] EWFC B10 has shone a light on the importance of relying on non-court dispute resolution where litigation might be disproportionate to the issues

When relations break down to the extent that family lawyers are called in, there is often intransigence on both sides such that the only means to release the deadlock and achieve an overall resolution is to have a judge impose a decision. But litigation is expensive and the court's resources stretched, particularly following the pandemic where most hearings continue to be heard remotely. As a result, it is not uncommon for litigation to become disproportionate to the sums actually in dispute.

This proved to be an imminent risk in *WL and HL (Rev 1) [2021] EWFC B10*. To summarise the background:

- WL and HL reached an overall agreement compromising their respective claims arising upon their divorce which was incorporated into a Consent Order dated 1 June 2018. By that Order, HL was obliged to pay WL one-half of their child's nursery costs and, from the date the child started school, one-half of her reasonable childcare costs.
- On 19 November 2020, WL applied to enforce and vary the Consent Order so that HL should similarly have to contribute towards the child's pre-school childcare with backdated payments. In circumstances where HL was in receipt of net income of £16,197 per month and WL net income of £5,100 per month, there was no question of affordability but rather principle.
- By the date of the first hearing on 16 December 2020, Recorder Allen QC (the judge) concluded that HL should make backdated payments of £517 per month from 9 December 2020 (being the date of WL's application) and £645 per month from 1 January 2021 pending a substantive hearing. However, by this point the parties had already incurred more than £15,000 in costs and estimated that they would incur a similar sum by the next hearing.

Part 3 of the Family Procedure Rules 2020 obliges the court consider at every stage in proceedings whether non-court dispute resolution might be more appropriate. Having regard to the above, the judge could see that the escalating costs of litigating matters were rapidly undermining the intention of the application itself. He therefore decided to exercise his case management powers under Part 3 and direct that WL's applications should be adjourned until 15 January 2021 to enable the parties to consider using non-court dispute resolution as an alternative.

What then followed was a carefully and cleverly-managed road map to guide the parties towards an out of court settlement:

- The judge directed the parties' solicitors to send him a joint letter by 14 January 2021 summarising the parties' engagement in, or endeavours to engage in, non-court dispute resolution together with a schedule of the dates of any offers made and responses received.
- On 13 January 2021, the solicitors confirmed that the parties had attended a single mediation session on 11 January 2021 with another session already arranged. They therefore requested a further two-week adjournment, to which the judge agreed.
- A further update was provided on 29 January 2021 with another request for an additional two weeks to see whether even more progress could be made, which was again agreed.
- By 12 February 2021, the solicitors were able to confirm that there was a "*broad level of agreement*" but with a number of drafting issues remaining which the parties hoped the judge could resolve. The judge responded to say that the drafting issues should be resolved consensually if possible. He therefore adjourned matters for a further two weeks making clear that should his input ultimately be required, he would not be bound to use either party's preferred wording though. However, if he did agree with one party's drafting, there could be cost consequences for the other.
- By 27 February 2021, the parties had been able to narrow matters to such an extent that there were only minor drafting issues remaining which the judge agreed to determine as a paper exercise rather than requiring the parties to attend court. He did so on 5 March 2021, bringing the proceedings to a conclusion.

Recorder Allen QC's approach in this respect has been commended. As such, the National Lead Judge of the Financial Remedies Courts, Mr Justice Mostyn, asked that the case be published as an example to other prospective litigants and it is understood that he is seemingly minded to publish all such other cases which find themselves being case-managed 'out' of the court and redirected towards non-court resolution in this way.

This is, therefore, an important development for our clients and a warning to those that might otherwise reject an invitation to attend more cost proportionate non-court resolution prior to the issuing of proceedings. Failure to do so could result in the details of their case (albeit potentially on an anonymised basis) becoming publically available. It is a stark warning to litigate responsibly, proportionately and to take/heed legal advice at an early stage.

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