St.Mary's
FAMILY LAW SPECIALISTS

Pay the costs for litigation misconduct

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Within financial remedy proceedings, the general rule as defined in the Family Procedure Rules ("FPR"), rule 28.3(5) is that the court will not make an order requiring one party to pay the costs of another party (hence the standard "no order for costs"), however, FPR 28.3(6) states 'the court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it is appropriate to do so because of the conduct of a party in relation to the proceedings' (whether before or during them).

FPR 28.3(7) provides a check list of factors, (a) to (f) for the judge to consider in deciding what, if, any costs order to make. Those factors include failure to comply with the FPR or court orders, unreasonably pursuing particular issues or any other aspect of a party's conduct in relation to proceedings which the court considers relevant.

Notably the factors between (a) and (e) are based on 'litigation conduct' and accord with Practice Direction 28A:

4.3 - Under rule 28.3 the court only has the power to make a costs order in financial remedy proceedings when this is justified by the litigation conduct of one of the parties. When determining whether and how to exercise this power the court will be required to take into account the list of factors set out in that rule…

4.4 - In considering the conduct of the parties for the purposes of rule 28.3(6) and (7) (including any open offers to settle), the court will have regard to the obligation of the parties to help the court to further the overriding objective (see rules 1.1 and 1.3) and will take into account the nature, importance and complexity of the issues in the case. This may be of particular significance in applications for variation orders and interim variation orders or other cases where there is a risk of the costs becoming disproportionate to the amounts in dispute. The court will take a broad view of conduct for the purposes of this rule and will generally conclude that to refuse openly to negotiate reasonably and responsibly will amount to conduct in respect of which the court will consider making an order for costs. This includes in a 'needs' case where the applicant litigates unreasonably resulting in the costs incurred by each party becoming disproportionate to the award made by the court. Where an order for costs is made at an interim stage the court will not usually allow any resulting liability to be reckoned as a debt in the computation of the assets.

Litigation Conduct

Litigation conduct, more suitably referred to as litigation misconduct is in its most simplistic terms conduct during proceedings. There is no set rule for what will be sufficient to amount to litigation conduct, but the factors and practice direction referred to above, along with the substantive amount of case law in the area, provide helpful pointers.

It is fair to highlight at the outset that usually, litigation conduct is penalised in costs. However, there are circumstances (somewhat rarer) where it can impact the overall award, particularly where the costs of the litigation have substantially reduced the matrimonial assets.

In P v P (Financial Relief: Non-disclosure)[1] the Wife had knowingly misrepresented her true financial position and failed in her duty to give full disclosure, Thorpe J held that whilst accepting that such behaviour was conduct which it would be inequitable to disregard, this should be reflected in an order for costs rather than a reduction in the share of the assets.

As per Mostyn J in OG v AG[2] : "*[T]hird, there is litigation misconduct. Where proved, this should be severely penalised in costs. However, it is very difficult to conceive of any circumstances where litigation misconduct should affect the substantive disposition*".

However, the Courts have not shied away from reflecting litigation conduct in the substantive award: in the 1988 case of B v B[3] the Court held that a wife whose conduct in relation to discovery and dishonest statements had amounted to contempt, as well as conduct which it was inequitable to disregard. Therefore she should have the award which she would otherwise have received, reduced to take account of the conduct.

More recently, in Rothschild v De Souza[4], Moylan LJ pointed out that an order for costs does not remedy the effect of there being less wealth to be distributed. In this case, whilst acknowledging that litigation misconduct will *generally* be reflected only in a costs order, the court commented that there are nevertheless cases where conduct, including conduct in separate but related proceedings, should be taken into account in determining the overall award. The reasoning being that there was less wealth to be distributed and the litigation conduct had had affected the substantive award.

In a 'needs' case where the assets are somewhat more limited, it has been made clear that the court are entitled to prioritise the needs of the party who has not been guilty of the misconduct (for example see the judgment of Moor J in R v B & Others[5]: "The conduct may be so serious that it prevents the court from satisfying both parties' needs. If so, the court must be entitled to prioritise the party who has not been guilty of such conduct.").

What will amount to litigation conduct?

There are two classes of litigation misconduct as identified by Moylan LJ in Rothchild v De Souza (discussed in more depth below), namely:

1) Misconduct within financial remedy proceedings
2) Misconduct in relation to other litigation.

[1] [1994] 2 FLR 381
[2] [2020] EWFC 52
[3] [1988] 2 FLR 490,
[4] [2020] EWCA Civ 1215
[5] [2017] EWFC 33

In respect of the first of those classes, litigation conduct tends to be successfully pursued in cases whereby parties have deliberately breached orders and rules; failed in their duties to the court and acted in ways which have increased the other parties' costs, for example:

- A party who has failed to comply with court directions therefore necessitating an adjournment.

- Failures to comply with court directions, the Family Procedure Rules, Practice Directions and the Efficiency Notice (see below).

- Failures to disclose and comply with the duty of full and frank disclosure (see for example Crowther v Crowther and DP v EP (conduct: economic abuse: needs) [2023] EWFC 6, where the judge found the wife's presentation of her case to be dishonest. Even though the wife had already been penalised for her conduct during the marriage by the unequal division of the assets in the husband's favour, the judge also made an order for costs against her).

- Failures to negotiate (see below)

- Oppressive enquiry and/or a pursuit of irrelevant or unreasonable issues (see for example HD v WB [2023] EWFC 2 in which the husband was penalised for unreasonably pursuing a case that a prenuptial agreement should be disregarded).

Failures to comply with orders, rules and practice directions

The importance of compliance with court orders, guidance and procedure cannot be undermined. In Xanthopoulous v Rakshina[6], Mostyn J considered that the deliberate flouting of court orders, guidance and procedure is a form of 'forensic cheating' and his judgment makes for interesting reading as to the persistent and blatant breaches:

> "*2. The preparation for this hearing can only be described as shocking:*
>
> *i) Paragraph 15 of the High Court Statement of Efficient Conduct of Financial Remedy Proceedings provides that skeleton arguments for interim hearings must not exceed 10 pages. The husband's skeleton argument ran to 24 pages and the wife's skeleton argument ran to 14 pages.*
>
> *ii) Skeleton arguments were due by 11:00 on the working day before this hearing. Both parties filed late. The husband's skeleton argument was filed only on the morning of the hearing. The wife's skeleton argument was filed at around 17:30 the day before the hearing.*
>
> *iii) Paragraph 18 of Sir Jonathan Cohen's order dated 15 March 2022 provided that the husband's statement was to be filed and served by 12:00 on 21 March 2022. The husband's*

[6] [2022] EWFC 30

statement is dated 22 March 2022. I do not know when it was filed, but I am told by the wife's representatives that it was only served on her on 24 March 2022.

iv) Paragraph 20 of that same order provided that the parties' statements to be filed and served for this hearing would be limited to 6 pages each with any exhibit accompanying the same limited to 10 pages (a total of 16 pages). The husband's statement ran to 11 pages and its exhibit ran to 15 pages (a total of 26 pages). The wife's statement also ran to 11 pages and its exhibit ran to 28 pages (a total of 39 pages).

v) FPR PD 27A paragraph 5.1 provides that unless the court has specifically directed otherwise that there shall be one bundle limited to 350 pages of text. I have been provided with four bundles respectively containing 579 pages, 279 pages, 666 pages, and 354 pages (a total of 1,878 pages).

3. *This utter disregard for the relevant guidance, procedure, and indeed orders is totally unacceptable. I struggle to understand the mentality of litigants and their advisers who still seem to think that guidance, procedure, and orders can be blithely ignored. In Re W (A Child) (Adoption Order: Leave to Oppose) [2013] EWCA Civ 1177, [2014] 1 WLR 1993, paras 50-51, Sir James Munby P, having referred to "a deeply rooted culture in the family courts which, however long established, will no longer be tolerated", continued:*

> *"I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed and complied with to the letter and on time. Too often they are not. They are not preferences, requests or mere indications; they are orders."*

That was nine years ago. But nothing seems to change…

…It should be understood that the deliberate flouting of orders, guidance and procedure is a form of forensic cheating, and should be treated as such. Advisers should clearly understand that such non-compliance may well be regarded by the court as professional misconduct leading to a report to their regulatory body".

This judgment does not stand alone in respect of criticism in respect of compliance with the necessary rules and directions. In WC v HC[7], Peel J stressed that witness statements must comply with FPR PD 27A and contain only evidence, not argument or other rhetoric. Pejorative but irrelevant s.25 statements will be met with criticism and possibly adverse costs orders:

"[C]ourt Orders, Practice Directions and Statements of Efficient Conduct are there to be complied with, not ignored. The purpose of the restriction on statement length is partly to focus the parties' minds on relevant evidence, and partly to ensure a level playing field. Why is it fair for one party to follow the rules, but the other party to ignore them? Why is it fair for the complying party to be left with the feeling that the non-complying party has been able to adduce more evidence to his/her apparent advantage?"

[7] (Financial Remedies Agreements) [2022] EWFC 22,

As per Crowther v Crowther[8], whilst focusing on the conduct of the Husband in particular, Mr Justice Peel noted (with somewhat despair as it reads) that at the time of this final hearing before him, the wife had filed 15 witness statements and the husband no less than 26 witness statements (!). There had been 34 court hearings and the court was presented with 4 bundles exceeding 6,000 pages. The parties' respective legal costs at this hearing were that the wife had spent £1,427,606 and the husband: £920,316 which completely exceeded what either party suggested the assets were worth.

The Judge noted that "*the lack of co-operation between the parties and their lawyers was very apparent*". He highlighted that at the pre-trial review he had directed a skeleton of 20 pages in accordance with the statement of efficient conduct, this was ignored by H's counsel who filed a 20 page skeleton and a further 15 pages of appendices, in the words of Peel J: "*this disregard…should not happen again*".

Whilst criticising both parties' litigation conduct, the Judge was of the view that "*H's conduct of the litigation has been at times obstructive, and deliberately so. His evidence to the me that "I can litigious when something is deeply unfair as these proceedings have been" is indicative of his approach…W is not entirely free of blame in her conduct of the litigation…W sold more horses than she was entitled to under various orders, although I accept this was an oversight rather than a deliberate breach. She has pursued applications which have not always been meritorious… the sheer scale of costs thrown at this case has been excessive…But overall I consider H to have been more blameworthy and his approach to the litigation will be taken into account when considering the costs*".

The Judge found H guilty of litigation misconduct and ordered that he should pay a portion of W's costs (25%). (Whilst a success for wife in someways, perhaps a helpful reminder to parties and representatives that if you wish to pursue a case asserting litigation conduct against the other party, repeating the words as they are within equity: you should come with clean hands).

The Husband's conduct in the Crowther case included (but was not limited to):

- H called a friend and neighbour to give evidence which was "*inappropriate and unhelpful*" and "*raised the temperature notably during the hearing*".
- H closed a joint business without W's consent immediately after the divorce petition.
- H failed to disclose a bank account with £10,000 in.
- H was 'less than frank' about his income and the Court was "satisfied during the proceedings that H had sought to conceal or minimise the extent of income available to him".

Lack of negotiating

Parties must constructively and openly attempt to settle cases. The requirements are clear by virtue of FPR 9.27A and PD28 paragraph 4.4.

Since the introduction of paragraph 4.4 in May 2019 a number of cases have considered the impact of this for example in MB v EB[9] the parties were in litigation for 2 years with costs totalling £1.25m at the point of final hearing. This was considered '*grossly disproportionate*' to the issues in the case.

[8] [2021] EWFC 88
[9] (No 2) [2019] EWHC 3676,

Cohen J considered the open offers which had been made by the parties and was critical of the Husband for failing to engage in open negotiations and failing to respond to the wife's offer at all. Cohen J limited the husband's claim on costs so that had to meet some of his costs from his needs award.

Now regularly cited by legal representatives faced with a situation of a party's refusal to negotiate, in OG v AG, Mostyn J said; "*if, once the financial landscape is clear, you do not openly negotiate reasonably, then you will likely suffer a penalty in costs*".

In AW v AH and others[10], Roberts J ordered the husband to pay 60% of the wife's costs. The husband had failed to provide the wife with a coherent narrative for his substantial disclosure, "*depriving her of a reasonable opportunity to settle and necessitating that the case be examined that the case be examined forensically at trial*".

The requirement to negotiate and attempt to settle matters is not just limited to at a final hearing, in LM v DM[11], Mostyn J applied the same principles when considering interim applications (maintenance pending suit and a legal services payment order). Noting that whilst the applicant was successful, she had not made any serious attempt to negotiate and she was therefore subsequently deprived of 50% of the costs award: "*Litigants must learn that they will suffer a cost penalty if they do not negotiate openly and reasonably*".

Incurring excessive costs – in financial remedy AND/OR linked proceedings

Legal representatives will be familiar with the rule change and the standard pro-forma orders that are now required at each hearing which record the costs incurred by a party, and the costs anticipated (see FPR 9.27(7) and paragraph 4.4 of FPR PD 28A). The intention of this is to try to encourage parties to negotiate openly and reasonably in order to save costs.

In the case 2019 case of TT v CDS[12], (unsuccessfully appealed as per Rothchild v De Sousa below), the entire judgment of Mr Justice Cohen is a helpful read. It notes that the "*litigation has been on a massive scale*", highlighting this did not just apply to the financial remedy proceedings. H had issued both divorce proceedings and proceedings in relation to the children of the marriage. The children proceedings were contested Hague Convention and Wardship proceedings alongside what the judge termed a 'course of conduct' seeking to achieve removal of the children from the Mother(wife) and their return to England.

Cohen J sets out at length the procedural chronology noting that during the financial remedy proceedings, the husband had made an application for maintenance pending suit and a Legal Services payment order – such application was struck out for his large number of failings to comply with court orders.

There was also a preliminary issue as to whether H's mother "Wanda" had a beneficial interest in the parties' company and properties. This resulted in a four day preliminary issue hearing whereby Wanda's claim was rejected. A costs order of £150,000 was made against the Husband and Wanda

[10] [2020] EWFC 22
[11] (Costs Ruling) [2021] EWFC 28
[12] [2019] EWHC 3572 (Fam)

(jointly). This remained unpaid at the time of this final hearing. Notably, the judgment highlights that there were actually no less than 13 costs orders made against husband in the sum of £267,782 – of which only £61,000 had been paid.

There were numerous aspects of the husband's conduct during the proceedings (as well as his pursuit in relation to the children) that were criticised by the Judge, including but not limited to:

- Husband being in contempt for failing to complete repair works on a rental property as ordered; he received a 28 day suspended sentence;
- Husband then (in breach of an order permitting Wife the right) renting out that property and benefitted from the income;
- Numerous injunctions had to be applied for by the Wife to prevent the Husband taking actions in relation to marital businesses and properties;
- Husband did not do a section 25 statement;
- Husband 'wilfully ignored correspondence'
- In relation to the matrimonial business, he withdrew £200,00 from the business account so as to leave insufficient to meet expenses; detailed his version of the divorce to staff; purported to sack a senior employee; tried to break into the office and changed the locks etc.

By the time the matter reached the final hearing that this judgment relates to, Husband was unrepresented and appears to have applied repeatedly for an adjournment citing various reasons, such applications were not successful with the judgment noting: "*Husband has sought to make a martyr of himself and quite deliberately put himself in a position where he could mount a claim for an adjournment*".

Rather amusingly (perhaps unrelated to conduct but more so the Judge's impression of the Husband) the judgment refers to "*Husband described himself to me (modesty is not one of his virtues) as "the master of arbitrage*".

Whilst the Judge made reference within his judgment to him not taking into account the Husband's conduct when determining his award, it was clear there was a departure to the wife. This was therefore consequently appealed and resulted in the Court of Appeal judgment below.

In Rothchild v De Souza[13] (the appeal of TT v CDS above), again a very worthwhile judgment to read, the Court of Appeal confirmed that litigation conduct can fall within s.25(2)(g): "*this being in part because, as he said, money spent on legal costs is no longer available to meet their needs or be shared between them*".

The Court of Appeal confirmed, as so many have before, that "*the general approach is that litigation conduct within the financial proceedings, will be reflected, if appropriate, in a costs order. However, there are cases in which the court has determined that one party's litigation conduct has been such that it should be taken into account when the court is determining its award*".

[13] [2020] EWCA Civ 1215

The judgment focuses upon relevant case law in the area but not just the vast legal costs spent on financial remedy proceedings, but also on other linked proceedings and the effect of those legal costs on the assets:

- R v B and others [2017] EWFC 33 – the husband incurred very significant liabilities of which the vast majority related to litigation after the breakdown of the relationship. He sought to include them within his liabilities as needs. This was rejected by Moor J who refused to include them as needs – "*he took them on and he must sort them out*"… "*there is no such thing as free litigation*".
- Martin v Martin [1976] Fam 335, as per Cairns LJ: "*a spouse cannot be allowed to fritter away the assets by extravagant living or reckless speculation and then claim as great a share of what was left as he would have been entitled to if he had behaved reasonably*". The Court of Appeal are of the view that this applies to both litigation conduct and other litigation.

The Court of Appeal came to the conclusion that the Judge *had* taken conduct into account in respect of the costs dissipated on litigation and that whilst it would have been better if the initial judgment had contained more explanation as to the reasons for the award (in respect of the litigation conduct too), the judgment was not defective, and the award was justified. The Court of Appeal further confirmed the Judge was entitled to take into account husband's litigation conduct, and, the amount spent on legal costs would have been a modest fraction of this but for the Husband's conduct.

In more recent decisions, the Court have continued to consider the approach where one party has unreasonably incurred considerably more legal fees than the other.

In the 2022 case of YC v ZC[14], W incurred legal costs of £463,331 whereas H's were £159,044. Having analysed the authorities on disproportionate costs spending, HHJ Hess stated that '*the court should be slow to allow the grossly disproportionate spender to feel that there is no check on legal costs spending … W must bear the burden for [her] poor decision making*'. The Judge therefore adjusted the asset schedule by adding back £200,000 to wife's side of the asset schedule. HHJ Hess made clear that in the right circumstances, a party could expect to receive an award that meets their needs at a lower level than what might otherwise have been the case as a result of overspending on legal costs.

Similarly, in P v P[15], DDJ Hodson was dealing with a sharing case whereby the Husband had paid £16,500 in legal fees and owed £8,000, and the wife had paid just over £100,000 and owed £28,500. The funds for the legal costs had come from marital assets.

Distinguishing the outstanding costs to the costs incurred, DDJ Hodson stated in respect of the the outstanding legal costs that: "[*I]f the outstanding costs are deducted before the marital pot is assessed and then the pot is shared equally, one party is in effect funding or subsidising the costs of the other. That seemed to me to be inconsistent with the expectation that the marital partnership assets, acquired during the marriage, should be divided equally." Whilst being of the view that generally in*

[14] [2022] EWFC 137
[15] (treatment of costs in sharing cases) [2022] EWFC 158,

sharing cases the Judge would expect each party to take responsibility for their own outstanding legal costs, in this case he did include them within the asset schedule reflecting that wife would have had to spend more (as the applicant). The Judge did comment that the wife may consider herself fortunate that was his decision.

In relation to the already incurred costs that had come from marital assets the Judge takes a more robust view that "English law almost seems to give tacit encouragement to parties to the invasion of marital savings in the relatively confident knowledge that it may well be all glossed over, lost in the wash, by the time of the final settlement or hearing. That cannot be right. It is accepting, through silence, unilateral conduct, perhaps sometimes by the party more willing to contemplate this sort of action. If the FDR or final hearing court doesn't give it much attention, the aggrieved party definitely does because they feel the other party has gained a distinctive advantage by their conduct in respect of the marital finances from separation until settlement". The Judge describes spending on excessive costs as an "advance" and in essence 'adds' it back into the pot, he did however distinguish it from the add-back jurisdiction which requires 'wanton dissipation' on the basis that it was added back in order to make sure he had a fair and appropriate amount in the 'pot' for sharing.

What is clear, both in relation to litigation conduct and otherwise is that these cases amongst others continue to highlight that costs should be proportionate, and, there may very well be repercussions to a party who 1) acts in such a way to amount to litigation conduct and 2) invades marital monies and assets to spend on excessive legal costs.

As a helpful reminder, a costs application can be made during proceedings at any interim hearing or at a final hearing, although parties who intend to seek a costs order against another party should 'ordinarily make this plain in open correspondence or in skeleton arguments before the date of the hearing'. In any case where summary assessment of costs awarded under rule 28.3 would be appropriate parties are under an obligation to file a statement of costs in CPR Form N260 (Practice Direction 28A, paragraph 4.5).

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