MPS tips and traps

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1. **The statutory test**
2. **Touchstones**
3. **The cost benefit analysis**
4. **Getting your ducks in a row**
5. **When it goes wrong**
6. **Get out of jail**

S. 22 Matrimonial Causes Act 1973

22 Maintenance pending suit

(1) On a petition for divorce, nullity of marriage or judicial separation, the court may make an order for maintenance pending suit, that is to say, an order requiring either party to the marriage to make to the other such periodical payments for his or her maintenance and for such term, being a term beginning not earlier than the date of the presentation of the petition and ending with the date of the determination of the suit, as the court thinks reasonable.

TL v ML [2005] EWHC 2860 [2006] 1 FLR 1263 *at §24*

(i) The sole criterion to be applied in determining the application is 'reasonableness' (s 22 of the Matrimonial Causes Act 1973), which, to my mind, is synonymous with 'fairness'.

(ii) A very important factor in determining fairness is the marital standard of living (*F v F*). This is not to say that the exercise is merely to replicate that standard (*M v M*).

(iii) In every maintenance pending suit application there should be a specific maintenance pending suit budget which excludes capital or long-term expenditure, more aptly to be considered on a final hearing (*F v F*). That budget should be examined critically in every case to exclude forensic exaggeration (*F v F*).

(iv) Where the affidavit or Form E disclosure by the payer is obviously deficient, the court should not hesitate to make robust assumptions about his ability to pay. The court is not confined to the mere say-so of the payer as to the extent of his income or resources (*G v G, M v M*). In such a situation, the court should err in favour of the payee.

(v) Where the paying party has historically been supported through the bounty of an outsider, and where the payer is asserting that the bounty had been curtailed, but where the position of the outsider is ambiguous or unclear, then the court is justified in assuming that the third party will continue to supply the bounty, at least until final trial (*M v M*).

See Also

F v F (Ancillary Relief: Substantial Assets) [1995] 2 FLR 45, FD

G v G (Maintenance Pending Suit: Costs) [2002] EWHC 306 (Fam), [2003] 2 FLR 71, FD

M v M (Maintenance Pending Suit) [2002] EWHC 317 (Fam), [2002] 2 FLR 123, FD

The Cost Benefit Analysis

1. Does the monthly sum justify the costs risk?
2. Analise the costs risk?
3. Costs are live.
4. Tactical Considerations

Open offers are important

28.3 Costs in financial remedy proceedings

This rule applies in relation to financial remedy proceedings.

(2) Rule 44.2(1), (4) and (5) of the CPR do not apply to financial remedy proceedings.

(3) Rules 44.2(6) to (8) and 44.12 of the CPR apply to an order made under this rule as they apply to an order made under rule 44.3 of the CPR.

(4) In this rule –

'costs' has the same meaning as in rule 44.1(1)(c) of the CPR; and

(b) 'financial remedy proceedings' means proceedings for –

a financial order except an order for maintenance pending suit, an order for maintenance pending outcome of proceedings, an interim periodical payments order, an order for payment in respect of legal services or any other form of interim order for the purposes of rule 9.7(1)(a), (b), (c) and (e);

(ii) an order under Part 3 of the 1984 Act;

(iii) an order under Schedule 7 to the 2004 Act;

(iv) an order under section 10(2) of the 1973 Act;

an order under section 48(2) of the 2004 Act.

(5) Subject to paragraph (6), the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party.

(6) The court may make an order requiring one party to pay the costs of another party at any stage of the proceedings where it considers it appropriate to do so because of the conduct of a party in relation to the proceedings (whether before or during them).

(7) In deciding what order (if any) to make under paragraph (6), the court must have regard to –

any failure by a party to comply with these rules, any order of the court or any practice direction which the court considers relevant;

(b) any open offer to settle made by a party;

(c) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(d) the manner in which a party has pursued or responded to the application or a particular allegation or issue;

(e) any other aspect of a party's conduct in relation to proceedings which the court considers relevant; and

(f) the financial effect on the parties of any costs order.

(8) No offer to settle which is not an open offer to settle is admissible at any stage of the proceedings, except as provided by rule 9.17.

(9) For the purposes of this rule 'financial remedy proceedings' do not include an application under rule 9.9A.

The Statement – the Applicant

1. Standard of Living
2. Turning off the Taps
3. Post separation changes

The Respondent

1. Demand an Interim Schedule
2. Explain and Justify Post Separation Changes
3. Identify pre separation strains
4. Identify Resources Available to the Applicant
5. Make an Offer
    - Pitch it carefully
    - Think of the Economic Consequences

When it goes wrong

It is an advocate's responsibility, whether invited or not, to draw the attention of the judge to any ambiguity or deficiency in the reasoning (*English v Emery, Reimbold & Strick* [2002] 1 WLR 2409

Rattan v Kuwad [2021] EWCA Civ 1

The Facts

- H was software consultant
- W was LIP
- Upon divorce job had “come to and end” unable to find other work.
- H sent £360,000 to India over a 10th month to April 2019 and possibly a further £285,000 in the 4 months from April to July 2019 the date of the First Directions Appointment.
- Owed some £300K in directors loan, owed £250K to his brother in India but gave no explanation for the transfers of £360,000.
- W relied upon her form E schedule and sought and £2,830 pcm and School fees £650pm.
- DDJ Morris
    - Disallowed certain aspects of the schedule £3000 for house repairs

- Husband could work
- Directed the mortgage should be on fixed rate to save £600pcm
- Order £2850 MPSase

- H appealed

The First Appeal

25. The husband appealed from the DDJ's order. The order was challenged on a number of grounds including what were said to be procedural flaws as to the listing of the application on 1st October. However, the focus of the appeal was on the judge's financial analysis which was said to be deficient in a number of respects. It was argued that the DDJ had “failed to direct herself on the applicable law relating to an application” for maintenance pending suit, the “usual approach [being] to examine a specific budget of immediate expenditure needs to deal with short-term cash flow problems”. In her judgment the DDJ had “failed to analyse [the wife's] budget”, “failed to identify what part of [the wife's] budget [the DDJ] found reasonable and essential expenditure”; “failed to analyse [the husband's] budget and his needs”; and the DDJ had made “unreasonable assumptions as to [the husband's] available financial resources”.

27. The Judge considered that the wife's budget and concluded that aspects of it were “not short-term … income needs”. These included items such as house insurance, house alarm, car tax, shoes and clothes, TV licence and entertainment. The DDJ had not undertaken a “critical analysis of the wife's needs”, which included “absolutely everything that is spent”, and had, therefore, “failed to apply the law appropriately”. The Judge repeated that “it is immediate expenditure needs which need to be looked at, nothing more”.

28. The Judge also considered that the DDJ had not sufficiently analysed the husband's needs to identify what “he might reasonably need over a short period of time”.

29. In respect of the order that the mortgage terms should be changed, the Judge concluded that this was not something the court had power to order. The Judge also decided that the wife's application for school fees was not “appropriate for a maintenance pending suit application” because they were “long-term expenditure items” and should not be included as maintenance.

- Declined to make any alternative order.
- Wife Appealed

Macur, Moylan and Asplin LJJ

Moylan J on **G v G (Child Maintenance: Interim Costs Provision) - [2010] 2 FLR 1264**
Moylan J

> **[51]** Interim hearings are an expensive exercise and, in my view, they should be pursued only when, on a broad assessment, the court's intervention is manifestly required. The jurisdiction to make an interim award is a very broad jurisdiction. The terms of para 9 of Sch 1 state simply that 'the court may, at any time before it disposes of the application, make an interim order … requiring either or both parents to make such periodical payments at such times and for such term as the Court thinks fit'.
>
> **[52]** It is a very broad jurisdiction but it is one which, as I have said, should be exercised when, on a broad assessment, the court's intervention is manifestly justified. Otherwise parties will be encouraged to engage in what can often be an expensive exercise in the course of the substantive proceedings, when the proper forum for the determination of those proceedings, if they cannot be resolved earlier by agreement or otherwise, is the final hearing when the evidence can be properly analysed and the parties' respective submissions can be more critically assessed.

Note comment by Moylan J in Rattan v Kuwad [2021] EWCA Civ 1

> [40]… I would point out the context of my observations. The wife had cash and investments of approximately £1.4 million and was living in a house purchased, following the breakdown of the marriage, for £2.9 million with funds provided by the husband. The husband was paying, and proposed to continue to pay, maintenance pending suit at the rate of just over £200,000 per year. The wife was seeking an additional sum of between £70,000 and £190,000. It was in that context that I made comments about when the court's jurisdiction should be invoked. The comments I made have no relevance to the present appeal.

Appeal allowed

- Simple case can use the form E schedule
- Not unduly complex application and did not require any extensive analysis.
- Broad assessment.
- Perfectly to present quarterly or payments on a monthly basis.

- School fees are a perfectly proper element of interim provision. No reason for a separate application.
- it would be appropriate for a court determining any appeal also to determine, if allowing the appeal, what alternative order, if any, should be made

Tips and Traps

- Cost benefit analysis
- Use the 5 touchstones
- Draft an interim budget
    - Monthly
    - School fees (as if that was ever in doubt)
- Set out standard of living and clearly state the turning of the taps
- Make offers.
- Analysis can be pretty rudimentary in a simple case.
- Patch up the Judgment.

Further reading

BN v MA [2013] EWHC 4250
YM v NM [2020] EWFC 13
TL v ML [2006] 1 FLR 1263
M & M (maintenance pending suit) [2002] 2 FLR 123
MET V HAT (interim maintenance) [2014] 2 FLR 692

Question

"If acting for a party in desperate need of financial support, is it possible to lodge the MPS application at the same time as the divorce petition? If so, how is the best way to deal with this given both the extremely long wait for petitions to be issued and the way they are dealt with centrally and have you any guidance on the court's approach in this scenario?

See Rule FPR 20.3.1(a) FCP 3.829

Note you must satisfy the urgent criterion

See also CPR 25.2 White book

(r.25.2(2)(b))

25.2.4
The general rule is that an order for an interim remedy may be made at any time; but the court may grant an interim remedy before proceedings have been started only if (i) the matter is urgent, or (ii) it is otherwise desirable to do so in the interests of justice (r.25.2(2)(b)). The court should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the application or there has been literally no time to give notice before the remedy is required (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note) [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC*).

Some interim remedies have been designed specifically for use before a claim has been made (cf. "before proceedings are started" in r.25.2(1)(a)). A good example is an interim remedy in the form of an order under the Senior Courts Act 1981 s.33(1) or the County Courts Act 1984 s.52(1) (Order to inspect, etc., and to take samples, etc., of property before claim made) (see r.25.1(1)(i)). Former rules of court did not suggest that orders granting such remedies could only be made on a showing that the matter was "urgent". It may be said that they could not be granted unless "necessary to do so in the interests of justice". To that extent the former practice and r.25.2(2)(b) are in accord.

Strictly speaking, timing and urgency are quite separate matters (and both are separate from the question whether application should be made on notice or not). However, it is not surprising that, at least in relation to some interim remedies, they should be mixed.

Circumstances can arise when it is in the interests of justice that a person should be able to obtain an order for an interim remedy before beginning their claim, even though that remedy is not specifically designed for use before a claim has been made.

In terms, a finding of urgency is no longer essential for the granting of an interim injunction. Further, other forms of interim relief can be denied on the ground that they are not urgent. It could be argued that no harm would be done if the urgency rule were deleted entirely from r.25.2(2)(b), since if the claims are urgent, it is in the interests of justice that they should be granted.

Where urgent applications and applications without notice are made in proceedings to which PD 25A applies, whether before or after a claim form has been issued, the provisions in paras 4.1 to 4.5 of that practice direction apply (see para.25APD.4). When an application for an injunction is made before the claim form has been issued, the applicant will be required to undertake to the court to issue a claim form immediately (see para.25APD.4 (4.4(1))). The obligations of counsel and solicitors on a without notice application to see that there has been full disclosure and that the correct legal procedures are used (as to which see paras 25.3.5 and 25.3.6) apply equally in cases where the interests of the public are also involved, because derogations from the principle of open justice (such as anonymisation or restrictions on reporting) are sought. The court's obligation to ensure open justice is a continuing one, so such derogations, if granted, must be reviewed on the return date (*Gray v UVW [2010] EWHC 2367 (QB)* (Tugendhat J)).

When an undertaking given to the court (for example to issue a claim form) is not complied with, there must be an enquiry by the court as to why that happened and what, if any, sanction or consequential order should be imposed (see *Gray v UVW* op cit.).

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