JUDICIARY OF
ENGLAND AND WALES

PRESIDENT OF THE FAMILY DIVISION

President's Guidance

Divorce, Dissolution and Separation Act 2020: Costs in proceedings for matrimonial and civil partnership orders

Introduction

(1) The Divorce, Dissolution and Separation Act 2020 ("the 2020 Act") amends the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 to remove fault-based concepts in proceedings for divorce, dissolution and (judicial) separation. This is a fundamental change which will affect the way in which the courts deal with applications and the purpose of this guidance is to explain the impact of this change on the court's approach to costs. The amendments made by the 2020 Act take effect from 6 April 2022 and this guidance applies to applications issued on or after that date.

(2) The great majority of applications are likely to be undisputed and cases will not involve any consideration by the court of the reasons for or responsibility for the breakdown of the marriage or civil partnership. Even where an application is disputed, the grounds for opposition will be limited to issues about the court's jurisdiction to hear the case or about the validity or subsistence of the marriage or civil partnership. It follows that, while the court will retain a discretion to make a costs order against either party, the circumstances in which an order for costs will be appropriate are likely to be very limited.

The governing principles

(3) The exercise of the court's discretion to make a costs order in proceedings for a matrimonial or civil partnership order is governed by the relevant provisions of the Civil Procedure Rules, as applied to family proceedings by rule 28.2(1) of the Family Procedure Rules, and in particular CPR rule 44.2 (excluding r 44.2(2) and (3)).

(4) CPR rule 44.2(4) provides that, in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including –

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) By CPR r 44.2(5), the conduct of the parties includes –

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;

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

(c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

(6) The effect of these provisions is that in proceedings for a matrimonial or civil partnership order the court has a wide discretion in relation to the award of costs. There is no general rule that costs are awarded to a successful party; the court must consider all the circumstances. However, these provisions must be considered in the context of the court's role in the proceedings.

The approach under the new law

(7) Under the new process the court's decision about whether to make a divorce order, dissolution order or (judicial) separation order does not depend on any findings about the responsibility of either party for the breakdown of the relationship. There is therefore no scope for the court to consider the conduct of the parties in that respect. The parties' conduct in relation to the proceedings (whether before or during the proceedings or in the manner in which a case has been pursued or defended) will remain relevant; in particular, if the court concludes that the conduct of a party has been unreasonable (for example by attempting to evade service or raising spurious or irrelevant arguments) and that costs have been incurred or increased as a result, an award of costs in favour of the other party may be appropriate.

(8) Equally, the concept of 'success' will be of limited application. In a standard case, where the court has not been required to determine any dispute between the parties, it is not appropriate to regard either party as having succeeded in the outcome. In a disputed case, different considerations may apply, depending on the nature of the dispute and the issues raised by the parties, but bearing in mind the limited grounds for opposing an application: see below.

(9) These considerations mean that in the great majority of cases, including joint applications, where an application for an order for divorce, dissolution or (judicial) separation is not disputed and the parties have conducted the proceedings in a reasonable manner, a costs order would be inappropriate.

(10) Where a divorce or dissolution application is disputed on the ground that the court does not have jurisdiction to hear it, for example because the marriage or civil partnership has already been dissolved overseas, or because the marriage or civil partnership does not validly subsist, there will likely be a separate hearing to determine that issue. If the defending party is unsuccessful the court will consider whether the pursuit of the defence was unreasonable. If the court determines that it was, it will normally determine that it would be appropriate to order that the unsuccessful defending party should pay the costs of the successful party. If the court determines that the pursuit of that defence was not unreasonable, it will nonetheless consider whether to make an order for costs in any event in favour of the successful party to reflect the court's decision on the specific issue.

(11) The changes made by the 2020 Act do not affect the grounds for seeking a nullity order or the court's approach to making a costs order in nullity proceedings, but the procedure for seeking a costs order is changed as described below.

Procedure

(12) The forms of application for a matrimonial or civil partnership order do not include any provision for making an application for a costs order. In a disputed case any application for costs may be made at the hearing of the application: see FPR, r 7.32(1). In a standard case, any application for costs should be made by application notice: see FPR, r 7.32(2); the procedure is set out in Practice Direction 7A. This procedure applies to proceedings for a nullity order as well as to proceedings for divorce, dissolution or (judicial) separation.

(13) In a standard case, the application notice or written evidence in support must set out the grounds on which a costs order is sought. In the case of proceedings for divorce, dissolution or (judicial) separation the applicant should have regard to the guidance above and set out clearly any conduct in relation to the proceedings which is said to justify the making of a costs order. Wherever possible the applicant should specify the amount of costs claimed, showing how the amount has been calculated; Form N260 (Statement of Costs for Summary Assessment) is not required unless directed by the court. A respondent who opposes the making of a costs order or disputes the amount of costs claimed must file a witness statement in response and the court will normally deal with the application without a hearing, on the basis of the parties' written statements.

28 March 2022