

The Judgment in this matter is being distributed on a strict understanding that in any report no person other than the attorneys (and any other person identified by name in the Judgment itself) may be identified by name or location and in particular the anonymity of the child and the adult members of their family must be strictly preserved.

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FAMILY DIVISION**

**Cause No.: FAM 183 of 2017
(LACV0125/2017)**

BETWEEN:

JS

Petitioner

AND:

BS

Respondent

Appearances: No appearance required by, or on behalf of the Petitioner
No appearance required by, or on behalf of the Respondent

Before: Hon. Justice Marlene I. Carter Actg.

**Judgment
Delivered:** 18th June 2018



HEADNOTE

**Legal Aid Law (2015 Revision) – Section 38
Application for grant of extension of Legal Aid Certificate –
Circumstances in which the Director may require a contribution –
Resources of the applicant**

The proper names of the parties have been abbreviated to protect their privacy where those names appear in the course of the Judgment.

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JUDGMENT

1. On the 18th July 2017 the Applicant/Petitioner was granted a Legal Aid Certificate (hereinafter “the LAC”) to assist with Divorce and Ancillary Proceedings. The certificate was capped at CI\$4,500.00, which sum was not to be exceeded without a further grant. On the 13th December 2017 there remained CI\$1,706.00 on cap. On that date, this figure was increased to CI\$2,500.00 for the completion of all ancillaries.

2. On the 26th February 2018, upon further application the cap was again extended. The conditions for the grant of the legal aid extension on this occasion were as follows:

“Legal Aid Extension granted.

Limited to covering final ancillaries hearing and application to remove child from jurisdiction and related matters of removal only.

Cap extended from \$2500.00 to \$8000.00 to deal with all matters and shall not be exceeded without further grant of approval.

Direct that appointed Attorney request of the Court to consider making order for recovery of costs to the Legal Aid Fund. Alternatively, if no costs orders are made, the sum of \$4500.00 shall be recovered and paid by the Assisted Person to the Legal Aid Fund from any capital or resources received by her at final ancillaries.”

3. Relevant to this appeal, on the 11th of May 2018 a further extension was sought by the applicant. This Legal Aid extension application was refused. The Director of Legal Aid (hereinafter “the Director”) refused the application on the 22nd May 2018 and gave her reasons for the refusal as follows:



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“Legal Aid Extension refused.

From a review of the documents filed in this matter after the last extension of legal aid was granted, it would seem that the Assisted Person has access to resources from which she can draw from to assist with her legal fees privately.

Having regard to the stage of the proceedings, the sum spent to-date and being claimed by counsel to complete matter (which is not agreed), we are not minded to extend the cap any further than the \$8000.00 provided already.

We note that counsel is seeking an additional 42 hours plus the excess over the cap. If we include the sum claims in the Counsel’s ‘prebill’ and all other legal bills in this matter the sum of \$14,401.97 would be paid out to-date and this does not include the extension being requested which would bring this matter in excess of \$20K. We do not believe the circumstances justify a further expenditure of public funds unless a significant sum can be contributed (paid upfront) by the Assisted Person towards continuing this matter at the legal aid rate.”



4. The Petitioner sought a reconsideration of the decision made by the Director (hereinafter “the Decision”) by way of email communication to the Legal Aid Office on 25th May 2018 citing:

“My estranged husband (‘BS’) now has legal aid and the case is about the relocation of my young children to the UK with me. They are only 3 and 6 years old. We get rolled over in October this year and if I can’t bring them with me, then they will have to be separated from their loving mother which would ruin our lives. BS has legal representation now, which I simply will not be able to afford without legal aid. I will have to represent myself, but

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the complexity of this case and BS's relentless campaign of daily emotional abuse and vindictive behavior, will make navigating this myriad of issues and laws almost impossible for a layperson."

"I have made multiple attempts to come to an agreement with BS – all of which he rebuffed. He even stated in our MAIM assessment a couple of weeks ago, to Magistrate Philippa McFarlane, that he was not willing to mediate on any basis other than the children stay in with him. I'm not sure why he is entitled to legal aid when he refuses to explore other areas. It's incomprehensible. I have never wished to litigate. E.g. He wouldn't pay maintenance for my basic needs and dignity and forced me to litigate for an interim award, which used up a lot of my cap. He won't let me bring the children on holiday, so I have to figure out how to apply for leave from the court on my own."



5. The Director refused the request for reconsideration of the Decision on 29th May 2018. The Director sought to clarify her position as follows:

- "1. An extension was provided on the 5th March 2018 increasing the cap from \$2500.00 to \$8000.00 and stated that inter alia "...shall not be exceeded without further grant or approval.*
- 2. On the 27th of April 2018 an affidavit was filed by Patrick George MacDonald sworn on the 22nd March 2018 (on behalf of [JS]), which indicates the willingness (and action) to provide financial support to [JS] stating, 'we have specifically set aside the sum of not less than US\$25,000.00 (or GBP equivalent) for Jennifer to drawn (sic) down to help her get establish (sic) in the UK and become self-sufficient ...'".*

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3. *[JS] who is in good health is currently unemployed and now in receipt of a modest interim spousal/child maintenance.*
4. *Having considered all things including taking into account the total sums allowed on this matter and outlined in the correspondence to all Parties on the 17th May 2018, we are satisfied that sufficient Public Funds have been expended on this matter to assist [JS] with her relocation and ancillaries. We do not believe the circumstances justify a further expenditure of public funds without an upfront contribution, as [JS] is deemed to be financially able to secure legal services from private resources or she can contribute towards the cost of her legal aid.*
5. *We have deemed that legal expenses are part of the expenses of relocating and establishing herself in the UK and as such funds should be drawn from what is available to [JS] to assist with her fees.*
6. ...
7. *[JS] has requested to know, what amount of contribution will be acceptable, and having regard to points 2 and 6 above, the payment of KYD\$10,000.00 to Court Funds shall be paid to Court Funds if the extension was to be granted in the sum of \$20K. This sum maybe (sic) recovered by the Assisted Person at the end of the proceedings, if costs was awarded to her in the ancillaries.*
8. ...
9. *The decision outlined in the certificate dated 22nd May 2018 remains as outlined. [JS] can advise us on the contribution aspect of the*



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decision for the extension reconsideration. Any other appeal should be taken to the Grand Court in accordance with Section 38 of the Legal Aid Law.”

6. The Applicant, through her counsel, now appeals the Decision pursuant to Section 38 of the Legal Aid Law.

7. Counsel for the Applicant/Petitioner set out the basis of the appeal as follows:



“The basis for the appeal is that in our submission it (sic) the assets of [JS]’s parents should not be included in determining that she is able to make a contribution to legal aid. Although [JS]’s parents have agreed to make funds available to her to assist in the relocation, should any be permitted, it is submitted that the language of the affidavit indicates that this sum has not been gifted to [JS]. It is intended to be available for her and the children to relocate, should the Court permit relocation. The funds are entirely at the discretion of [JS]’s parents. [JS] has no legal or beneficial interest in those assets and accordingly they should not form part of her available income for the purposes of assessing her ability to meet legal fees.

The only available income to [JS] is her interim maintenance from the Respondent. There is no scope within that amount to enable her to make contributions.

We also ask the Court to note that since the application for an extension was made the Court Welfare Officer has provided a report which requests that [JS] is ‘mentally assessed’. There is also a request that she is drug tested for a period of time. There are therefore some additional indicators of [JS]’s vulnerability (whatever her viewpoint may be as to these requests) and we would submit that [JS] ought to be represented in these proceedings.

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We submit that the interest of this case, which involves serious children issues, merits an extension of legal aid to [JS] to cover such sum as is deemed to be reasonable to conclude the children aspect of this matter and that, in the circumstances, [JS] should not be required to make any contribution.”

8. The Court notes that the amount of the interim maintenance referred to by the Applicant’s attorney is in the sum of \$1,550.00 per month.
9. The affidavit of the Applicant’s father referred to by the Director was filed on the 27th of April 27, 2018. Patrick George McDonald deponed:

“4. *We believe that Jennifer will find it much easier to find work in Brighton & Hove. As parents and grand-parents, we want to provide emotional and practical, as well as financial, support for such a period as is required to set the foundations for a sustainable future for the family. We have specifically set aside a sum of not less than US\$25,000 (or GBP equivalent) for Jennifer to draw down to help her get established in the UK and become self-sufficient. To demonstrate our ability to do so, at PGS-1, I exhibit an HSBC bank statement with a balance of UAE Dirhams 341,376.59 as at 28 December 2017, which is equivalent to US\$92,000 at the prevailing exchange rate on 22 March 2018. I confirm that we have not depleted these funds in any way since that date and that we do not require these funds for our day-to-day living expenses or any other needs. We own our home outright and have no mortgage or rental payments to make.”*

5. *We would also reside in Brighton & Hove for the first two to three months, or as long as Jennifer needs us, while she gets herself and the children settled. We can look after the children to give her time*



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to find work and attend interviews as we know she has a strong desire to be self-sufficient, despite the financial assistance available to her.”

10. At issue are the circumstances in which the Legal Aid Director will require a contribution to the funds expended under a LAC be paid upfront by an Assisted Person to ensure extension of the LAC.

11. Sections 18 & 19 of the Law which are concerned with the Director’s power to require a contribution are relevant and are set out below:

18. *The Cabinet shall, after consultation with the Chief Justice, by regulations prescribe the calculation of the disposable income of an assisted person and the assessment of the amount of any contribution which he may be required to pay under section 19 having regard to the amount so calculated.*

19. (1) *Subject to subsection (2), the Director, on granting a certificate, shall require an assisted person to pay to the Government a contribution towards the sums payable on his account under the authority of the certificate.*

(2) *If the Director requires an assisted person to pay a contribution, he shall either require him to pay the same forthwith or by way of such periodical instalments as may be specified in the certificate granted to him.*

(3) *The amount of any contribution or instalment thereof which is due may be recovered by the Attorney General by civil action in a court of summary jurisdiction.*

(4) *Notwithstanding the provisions of this section, where in the circumstances of a particular case the Director is satisfied that it is appropriate in the interest of justice so to do, the Director may disregard the disposable income of an assisted person and not*



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require him to make any contribution in accordance with this section but the Director shall provide written reasons to the Court Administrator for so doing.

- (5) *In making any arrangements under this section, the Director shall have regard to the principle that any debt that is to be paid from the assisted person's disposable income shall be paid by the assisted person within five years from when the debt arises.*

12. The Legal Aid Regulations referred to in Section 18 above at Part 7, Regulation 22 provide that:

22. *The Schedule shall apply for the purposes of the calculation of -*
- (a) *the disposable income of an applicant for legal aid; and*
 - (b) *the amount of contribution an assisted person will be required to pay under a legal aid certificate.*

13. Certain other provisions of The Legal Aid Regulations are also relevant. Regulation 11(8) states:

11(8) In fixing the method by which any contribution shall be paid, the Director shall have regard to all the circumstances, including the probable length of time which any certificate granted as a result of the application will be in force, and may order the contribution to be paid in instalments or the whole or a part of it to be paid before a certificate is issued.

14. From the foregoing, it is clear that the Director is well within the discretion granted to her under the Law and the Legal Aid Regulations to require a contribution to be paid upfront by an Assisted Person to ensure extension of the LAC. Indeed, the wording of Section 19 (1) makes payment of a contribution **mandatory** unless the Director “*in the circumstances of a particular case ... is satisfied that it is appropriate in the interest of justice so to do, the Director may disregard the disposable income of an assisted person and not require him to make any contribution.*”

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15. The question on this appeal is whether the Director properly exercised her discretion in this instance.
16. The Director in the first instance determined that the LAC could be granted without a contribution. On the 28th February 2018, the requirement for a contribution was first inserted as a condition of the grant of the extension. However, the contribution was conditional upon whether a costs order had been made or not and the recovery by the applicant or *“any capital or resources received by her at final ancillaries.”*
17. It is apparent that the Director in coming to the Decision on the 22nd May 2018 considered the extent of the extension of the LAC that was being sought and the fact that the applicant, to use her words: *“who is in good health is currently unemployed and now in receipt of a modest interim spousal/child maintenance.”* These were all relevant considerations on the Director’s part.
18. The crucial aspects of the Director’s decision were recorded in the following segment of her reasons of the 22nd May 2018 where she stated that:



“From a review of the documents filed in this matter after the last extension of legal aid was granted, it would seem that the Assisted Person has access to resources from which she can draw from to assist with her legal fees privately.”

19. From a perusal of the legal aid file, the only documents on the file between those dates, i.e. between the 18th February and the 22nd May 2018, relating to this issue, were an email from the Respondent in the family proceedings and a copy of the affidavit of Mr. McDonald referred to at paragraph 9 herein. It appears that the affidavit of the applicant’s father was of some significance to the Decision. Indeed, it is the only evidence before the Director from which she could have reached the conclusion that she did that the applicant was financially able to secure legal services from private resources.

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20. On the 29th of May 2018 the Director in further clarifying the Decision, explained further:

“We do not believe the circumstances justify a further expenditure of public funds without an upfront contribution, as [JS] is deemed to be financially able to secure legal services from private resources or she can contribute towards the cost of her legal aid.

We have deemed that legal expenses are part of the expenses of relocating and establishing herself in the UK and as such funds should be drawn from what is available to [JS] to assist with her fees.”

21. The Director concluded that the legal expenses of the applicant in the family proceedings, for which an extension of the LAC was being sought, were properly part of the expenses of relocating and establishing herself in the UK and therefore the funds that Patrick George McDonald had stated by his affidavit of 27th April 2018 would be able to assist the applicant with relocating and establishing herself in the UK, if relocation were ordered, should be considered funds available to the applicant to assist with her legal fees. This is a significant leap in reasoning.

22. The affidavit of Mr. McDonald was filed in support of the Applicant’s relocation application. Within that context this court notes that Mr. McDonald’s affidavit was aimed at providing information to the Court to show and explain that he and his wife, the applicant’s mother, were “committed to supporting her and her children in building their new life.” The emphasis was on plans to “set the foundation for a sustainable future for the family” and to help the applicant, “**get established in the UK and become self-sufficient.**”

23. With due respect to the Director, there is nothing in Mr. McDonald’s affidavit to suggest that the applicant has ready access to those funds now or that they had been transferred to her. Mr. McDonald’s offer of assistance to the applicant, for resettlement in the UK, was

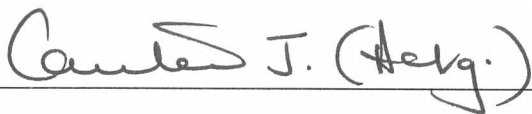


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premised upon her application for removal from this jurisdiction with the children being successful. It is entirely too far a leap to extrapolate from Mr. McDonald's affidavit that these funds were intended for any other purpose than what was stated. It is also entirely too far a leap to equate the applicant's legal expenses as being part and parcel of the expenses of relocating and establishing herself in the UK, and to conclude therefrom that Mr. McDonald's offer to assist with relocation was tantamount to offering to assist with the applicant's legal expenses.

24. The Director fell into error in considering the offer to assist upon relocation in the UK as evidence of the availability of funds to assist the applicant with the current application before the Court in this jurisdiction for relocation and other family proceedings. There is nothing to suggest, as the applicant's counsel has identified, that the funds offered from Mr. McDonald are funds now available to the applicant or that they are part of the applicant's legal or beneficial assets. There is nothing to support the Director's conclusion that *"the Assisted Person has access to resources from which she can draw from to assist with her legal fees privately."*
25. Accordingly, for these reasons, the appeal is allowed. The application for extension of the Legal Aid Certificate is remitted to the Director for her consideration.

Dated the 18th day of June 2018.



**HON. JUSTICE MARLENE I. CARTER
JUDGE OF THE GRAND COURT (ACTG.)**

