Neutral Citation Number: [2023] EWHC 982 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 April 2023

Before:

MRS JUSTICE KNOWLES

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Re Z (Disclosure to Social Work England: Costs)

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Dr Proudman for the Appellant mother
The Respondent father appeared in person
Jessica Purchase for the intervener, Social Work England

This application was determined on the papers

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Approved Judgment

This judgment was handed down remotely at 14.00am on 28 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mrs Justice Knowles:

1. On 2 March 2023 I handed down a judgment entitled Re Z (Disclosure to Social Work England: Findings of Domestic Abuse) [2023 EWHC 447 (Fam) ["the main judgment"]. That judgment allowed the mother's appeal against the decision of HHJ Ahmed to refuse disclosure of a transcript of his fact-finding judgment to Social Work England ["SWE"] the regulatory body with responsibility for the fitness to practise of social workers in England. SWE was an intervener in that appeal and, in written and oral argument, supported the mother's case on appeal, acknowledging that it would be impossible for SWE to properly consider any concerns raised about the father's fitness to practise without disclosure of the judgment.

2. By a document dated 2 March 2023 which also contained brief submissions on the issue of costs, the mother sought a costs order against either SWE and/or the father in the sum total of £12,454.88. Of that sum, £12,000 was said to be counsel's fee inclusive of VAT and remainder of the costs sought related to the appeal issue fee and bundle costs. The mother has not sought for either SWE or the father to each pay a specific proportion of her costs: for example, SWE to pay 80% and the father to pay 20%. On 27 April 2023, the mother submitted a fee note from counsel in the sum of £10,810.60 and explained that she had raised £1,250.00 via crowdfunding to pay her costs relating to the appeal, of which £500 was her own money. I have calculated that the total amount of costs now sought, less the mother's own money and taking into account the sum raised via crowdfunding, is £10,515.48.

3. On 14 March 2023, my clerk emailed the parties and SWE to indicate that I would determine this issue on my return from leave after Easter and directed that SWE file written argument in response by 20 March 2023 and the father by 31 March 2023. I gave no direction for the mother to submit a further document on the issue of costs as she had made submissions on this issue in her 2 March 2023 document.

4. I have read two documents from the mother, one dated 2 March 2023 and the other undated but submitted on 30 March 2023 which provided a detailed timeline of her interactions with SWE prior to and following the judge's decision. I also considered an email sent by the mother on 27 April 2023 providing a fee note from direct access counsel instructed on her behalf in the appeal. SWE's submissions were dated 20 March 2023 and opposed the mother's application. Following an email prompt from my clerk sent to the father on 21 April 2023, the father filed some short written submissions on 26 April 2023, opposing the mother's application for costs.

5. This judgment should be read alongside the main judgment.

The Parties' Positions

6. In essence, the mother's case was that the appeal against the judge's decision should have been brought by SWE and not by her. SWE's stance was unreasonable because it took no action when, as the appropriate statutory body, it should have done. As a victim of domestic abuse, the mother incurred financial costs and the inevitable strain of mounting the appeal against the judge's decision when this action should have been taken by SWE. She submitted that, for that reason, SWE behaved unreasonably. She accused SWE of a dereliction of its duty to protect the public as the regulator of social work fitness to practise. Likewise, she submitted that the father's stance in opposing

the appeal was also unreasonable because his submissions failed to engage meaningfully with the consequences of non-disclosure for the mother, namely that she might once more have to give evidence about her abuse within SWE's own processes instead of those processes respecting the conclusions reached in the judge's fact finding judgment.

7. SWE submitted that, in September 2022, it did not know why the judge had refused it access to the fact finding judgment. This was because it had only received an order that its application for a transcript of the fact finding judgment had been refused. That order was not accompanied by a judgment explaining the judge's decision. On 28 September 2022 when the mother made her application for permission to appeal, SWE stated that it was still considering whether or how the fitness to practise investigation into the father could continue without sight of the fact-finding judgment. It was not unreasonable for it to do so before deciding whether to appeal or to join the mother's appeal as an intervener. At the appeal hearing in February 2023, SWE had assisted the court by bringing information about its processes which, it submitted, contributed to the appeal's success. In those circumstances, ordering costs against a supportive intervener would be a concerning precedent to set and would likely have a *"chilling effect"* on potential interveners in future cases. SWE had incurred its own costs and paying the mother's costs would not be an appropriate use of public funds.

8. The father opposed the application that he pays part or all the mother's costs. He was now in a difficult financial situation, having been made redundant from his social work job. He cannot afford to be represented at SWE's regulatory hearing and has had to borrow money from family and friends so that he can be represented in the children proceedings concerning Z. He noted that the mother had launched three applications to appeal various decisions made by HHJ Ahmed following the handing down of the main judgment, all of which were dismissed by Poole J on 21 April 2023.

The Legal Framework

9. The costs regime in family proceedings is governed by rule 28.1 of the Family Procedure Rules 2010 ["the FPR"] which states that the court may, at any time, make such order as to costs as it thinks just. Rule 28.2 provides that, subject to rule 28.3, Parts 44 (except rules 44.2(2) and (3) and 44.10(2) and (3)), 46 and 47 and rule 45.8 of the Civil Procedure Rules ["CPR"] apply to costs in family proceedings. The exclusion of rule 44.2(2) of the CPR exempts all family proceedings covered by the FPR from the general rule that the unsuccessful party should pay the costs of the successful party.

10. The discretion to make such costs order the court thinks just is not uncircumscribed given the application of the majority of the rules in relation to costs contained in the CPR. In the context of this application, the most relevant of those rules that are applicable are contained in the following provisions of CPR 44.2:

> *"(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –*
>
> *(a) The conduct of all the parties;*

(b) Whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) Any payment into court or 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) 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 the 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."

Amongst the costs orders which the court might make under this rule, the court may order that a party pay a proportion of another party's costs.

11. CPR Rule 44.4 highlights the factors to be taken into account in deciding the amount of costs. When assessing costs on the standard basis, the court will have regard to all the circumstances in deciding whether costs were proportionately and reasonably incurred or proportionate and reasonable in amount. Assessment on an indemnity basis does not arise on the facts of this application. Rule 44.4(3) states that the court will also have regard to the following matters:

a) the conduct of the parties including, in particular, conduct before, as well as during the proceedings and the efforts made, if any, before and during the proceedings in order to try and resolve the dispute;

b) the amount or value of any property involved;

c) the importance of the matter to all the parties;

d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

e) the skill, effort, specialised knowledge and responsibility involved;

f) the time spent on the case;

g) the place where and the circumstances in which work or any part of it was done; and

h) the receiving party's last approved or agreed budget.

12. Orders for costs in children proceedings will generally be rare because not only do they diminish the funds available to meet the needs of the family, but they may exacerbate negative feeling between two parents to the ultimate detriment of the child.

Discussion

13. In coming to my decision, I have had regard to the legal framework described above and to the submissions made by each of the parties.

14. Dealing first with the application for costs against the father, I have discerned nothing in the mother's submissions which would justify the making of a costs order against him in what was litigation ultimately about a child. Though the father was ultimately unsuccessful, it was not unreasonable or reprehensible for him to have opposed the mother's appeal. He had a proper part to play, especially given that, having allowed the appeal, I decided to remake the disclosure decision instead of remitting it to HHJ Ahmed. If the father had not participated in the appeal hearing and made submissions contrary to those advanced by the mother and SWE, this court would have been deprived of the opportunity to hear both sides of the disclosure argument. The father conducted himself reasonably both before and during the appeal hearing in circumstances where the subject matter of the appeal was of the utmost importance to his future career, income and ability to financially contribute to Z's upbringing.

15. However, the mother's case for costs against SWE has much greater merit. Unlike the father, SWE is not a parent involved in litigation concerning a child but a public body with distinct and clear regulatory responsibilities. In this case, SWE, rather than the mother, was the applicant for disclosure of the transcript of the fact finding judgment. Once it received the court's order on 7 September 2022 which refused disclosure, SWE failed to take the obvious step of asking the judge to explain his reasons for refusing it disclosure of the fact-finding judgment. Additionally, in circumstances where SWE had not been given an opportunity to make representations to the court prior to the making of the order refusing disclosure, it – as a party affected by an order - could arguably have applied to the court for the order to be set aside pursuant to rule 4.3(5) of the FPR. Instead, SWE did nothing even though the mother impressed upon it the need to come to a speedy decision as to whether it intended to challenge the judge's order before the time to do so within the rules elapsed. In its submission, SWE accepted that *"knowing the contents of a judgment is, quite simply crucial to the decision of whether or not to appeal that judgment"*. I could not agree more but, here, SWE simply failed to take the proper steps open to it to inform itself of the judge's decision refusing disclosure. Whilst I accept that the court should have provided SWE with a copy of the judge's ruling, SWE failed even to ask for that as it should have done. I observe that a regulatory body such as SWE, which has an important safeguarding function, should be in a position to respond quickly to developments which affect its ability to carry out its regulatory functions. It should have had access to good legal advice about the implications of and methods of potential challenge to the judge's decision – that struck me as rather lacking when I perused the timeline submitted by the mother.

16. SWE had clearly come to a decision before asking for the transcript that disclosure of the fact finding judgment would be of great relevance to its enquiry into the father's fitness to practise so its failure to take any steps either to challenge the judge's decision or even to ascertain the basis upon which it had been reached struck me as

wholly inexplicable and unreasonable. SWE's inaction prompted the mother to issue her own application for permission to appeal in circumstances where she should not have needed to do so. Being blunt, SWE should have been the appellant and not the mother. However, once SWE was joined as an intervener, it played a helpful part in the appeal and was entirely supportive of the mother's case.

17. SWE submitted that ordering it to pay some of all of the mother's costs would set a concerning precedent for interveners in future cases. As a public body, SWE submitted that it had a responsibility to manage public money and paying the mother's costs was not an appropriate use of public funds in circumstances where it had incurred its own costs in intervening in the appeal at the court's invitation. I do not accept either of those propositions. As I observed in the main judgment, cases such as this are comparatively rare so SWE is not in the same position as a local authority, for example, which has specific legislative duties imposed on it to bring legal proceedings to protect children or vulnerable adults. Making an order for costs against SWE in the particular and unusual circumstances of this case is highly unlikely to have the chilling effect suggested by SWE. Public regulatory bodies which act reasonably in the course of their duties need fear nothing if they become involved in litigation. Likewise, as SWE's conduct was unreasonable, I see no justification for exempting it from an order for costs merely because it is a public body.

18. I have thought very carefully indeed whether SWE should pay all of the mother's costs. Its conduct prior to the start of the proceedings was unreasonable as I have explained, but it assisted the court at the hearing as the main judgment makes clear. I observe that the mother was not obliged to mount her own appeal against the judge's decision and take upon herself the safeguarding and regulatory duties which were properly those of SWE. She did all she could to encourage SWE to take the proper steps to challenge the judge's decision but could then have decided not to incur cost and expense on her own account. Likewise, once she had sight of SWE's skeleton argument in the appeal, the mother need not have participated further and incurred the cost of instructing counsel given that her position was virtually identical to that of SWE.

19. I have decided that the appropriate balance is struck in this case by requiring SWE to pay two-thirds of the mother's costs which I calculated at £10,515.48. I have deducted from the costs claimed by the mother the cost of preparing and lodging bundles as this falls squarely within the remit of what direct access counsel is permitted to do. Thus, SWE will pay to the mother within 28 days the sum of £7,010.32.

20. That is my decision.