Neutral Citation Number: [2023] EWHC 1244 (Fam)

Case No: LM13P00024 & 2019/0019

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/05/2023

Before:

THE HONOURABLE MR JUSTICE COBB

- -

Between:

Mr K	**Applicant**
- and -	
Ms E	**Respondent**

- -

Re D (Costs of Appeal: Application to Vary or Revoke Order)

- -

Laura Briggs KC and **Ian Black** (acting pro bono and under the direct access scheme) for the Appellant (Father)
Andrew Fox (acting pro bono but instructed by **Jones Myers, Solicitors**) for the Respondent (Mother)

Hearing date: 16 March 2023.
Further written submissions: 23 March 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MR JUSTICE COBB

This judgment was delivered in public. 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.

The Honourable Mr Justice Cobb:

Introduction

1. On 14 May 2020, Francis J delivered a judgment setting out his reasons for granting a father permission to appeal out of time, giving him relief against sanctions, and allowing an appeal, in proceedings which had been issued originally under the Children Act 1989 ('CA 1989'): see *Re D (A Child) (Appeal out of time)* [2020] EWHC 1167 (Fam). These proceedings concern a girl, D, who is now 12 years old.

2. Within the CA 1989 proceedings at first instance, a District Judge had made a factual finding in 2015 that the father had sexually abused D on a number of occasions. Francis J concluded that "there was a serious procedural irregularity in the proceedings in the lower court" and a "serious risk" that the decision was wrong (see [2020] EWHC 1167 (Fam) at [77]). He remitted the substantive CA 1989 application to me for re-hearing. He described the case as "a wholly exceptional case"; I agree. At that time of allowing the appeal, Francis J did not deal with the question of costs of the appeal as (he later observed): "so much would depend upon the findings made by the High Court Judge who was to conduct the re-hearing"[1].

3. I conducted a new fact-finding hearing over a number of days in the spring of 2021, delivering a lengthy and detailed judgment on 14 May 2021. On the evidence, I did not find that the father had sexually abused his daughter. I made a wide range of findings about both parents, notable among them is that:

> "The mother allowed her pre-existing feelings of hostility towards the father, playing out against a backdrop of difficult 'life stresses', to influence and determine to an ultimately insupportable degree her assessment, and reporting, of what her daughter had said to her. Very soon she was caught up in what she genuinely perceived was an 'horrendous' (her word) situation in which professionals were actively validating her concerns, and advising her to protect her daughter from abuse."

4. Following the re-hearing of the factual dispute, I remitted back to Francis J the question of costs of the appeal. Francis J considered the written arguments of the parties on paper; the mother was then acting in person, though presented an extremely thorough and well-argued document. The judge prepared a judgment, the draft of which was circulated to the parties on 3rd November 2021.

5. The mother prepared a response to this draft judgment dated 25 November 2021; in that document, she said this:

> "I fully accept the Court has a wide discretion and is ultimately entitled to find that I should be required to pay a sum of money towards the Father's costs, however, I am

[1] Costs Judgment: 19 Jan 2022: §6

> unclear as to why I should be considered liable for half of the costs incurred by the Father during the time that the Guardian opposed the Father's appeal as I did between November 2018 and January 2020.
>
> I understand that in Mr Justice Francis' Judgement I should have changed my position in light of the support from the Guardian (as of 6th January 2020) and I accept this decision".

6. The finalised judgment on costs was in fact handed down on 19 January 2022 ("the costs judgment") and on that day Francis J ordered that the mother should pay one-half of the father's costs of the appeal. This was assessed at c.£76,000. Francis J gave the mother 24 months to pay (payment is therefore due by 18 January 2024) and directed that no interest was to accrue on the award in that period. After the delivery of the costs' order and judgment, the mother contacted Francis J (by e-mail to his clerk) on 21 February 2022 in these terms:

> "I feel I must make the Court aware that I am at a loss in how I pay for this costs award. I have no available resources in order to meet this costs award to the father, this whole case has cost me, including the costs award, in excess of £200,000. My lifesavings have gone and I am in debt from the ongoing proceedings, all funds which have been allocated to the ongoing proceedings. Following your costs award made to the [father], I simply cannot afford to pay this sum of money in its entirety and after discussing the options available to me, I am left with the dire potential outcome of having to pursue bankruptcy if I cannot raise the funds".

It will be apparent from this communication, within only a few weeks of the costs order, that the mother was asserting that she would not be able to meet the order made against her.

7. Eleven months passed. In that period the parties have been engaged in the 'welfare' stage of these CA 1989 proceedings. Then, on 17 January 2023, the mother applied for an order that the costs order be rescinded or substantially varied. She initially purported to bring the application under section 31F(6) of the Matrimonial and Family Proceedings Act 1984 ('the 1984 Act'); it is now accepted by counsel and by the mother herself that the statutory basis on which her application was originally based was erroneous given that the costs order had been made in the High Court exercising its appellate jurisdiction in relation to a private law matter. The hearing proceeded before me on the basis that the court could exercise its power under rule 4.1(6) of the Family Procedure Rules 2010 ('FPR 2010') to "vary or revoke" this costs order if it was considered appropriate.

8. For the purposes of determining this application, I received and read a sizeable bundle of documents; I was provided with the mother's updated Form E (the gist of this document was given to the father). I heard counsel for the mother and leading counsel for the father. Counsel appeared *pro bono*, and I am immensely grateful to them for their generosity in this respect. At the end of the oral argument, I invited further submissions on whether I could make an order that the costs order not be enforced

without leave of the court – a relatively commonplace order where the party against whom a costs order is made is publicly funded (not the situation here). Both counsel supplied me with further written submissions. I reserved judgment.

Context

9. Steps are now being taken within the context of 'welfare proceedings' to help D to understand that her long-held beliefs about her father (i.e., that he has abused her when she was an infant) are in fact false. No one can be in any doubt about this exquisitely difficult and sensitive task.

10. In these ongoing welfare proceedings, I explored at some length whether services could be made available within the relevant local authority which could undertake this difficult piece of therapeutic work; this enquiry drew a blank. Nor was/is there any funding available within the local authority to facilitate this. The current programme of therapy was sourced following an extensive search by the Children's Guardian and the mother. A therapeutic package is being offered privately and is now in place. The total cost of this package is about £2,500, which I have directed is to be split equally between the parties, with the father's share being paid by the mother and deducted from the order for costs against her. At the moment, the mother has settled invoices of c.£650.

11. The mother has reported, and I have no reason to doubt, that the therapeutic process has been an incredibly difficult one for her and her family and as anticipated it has been highly emotional and distressing for D. D is a party to these proceedings and has a Children's Guardian who has, unusually, not yet met her; D is reluctant to make this engagement but is at least now aware of these court proceedings. D has communicated to her therapist that at present she does not wish to have any contact, indirect or otherwise, with the father. D's views are reported to be clear and unequivocal.

12. At the last hearing before me in March 2023, the father's position (which had hitherto been a strong wish to re-instate his relationship with his daughter) fundamentally changed. The position statement prepared on his behalf contains the following:

> "Realistically, the prospect of a shift from [D]'s current stated position to her wishing to have direct contact with her father in the limited sessions that remain under that plan is remote. The father acknowledges this, and further acknowledges that there simply are not the resources available to fund the in-depth work that would be necessary to bring [D] out of this harmful mindset. To press for direct contact without [D] being properly supported by such work would be distressing for [D]. The father does not want this. He is prepared to change tack and to take direct contact 'off the table' in these proceedings …
>
> The father does not abandon the principle that it is in [D]'s interests to understand that the abuse did not happen and that he is not a risk. His intention is to allow [D] to develop that understanding slowly, consistently and in a non-confrontational manner via indirect contact and recognition of the fact that he is her parent, he is responsible for her and

> he will always be supportive of her". (Position Statement 10 March 2023).

13. This is, in my judgment, a constructive and realistic stance, reached I am sure with considerable sorrow, which I hope will pave the way for fruitful discussions at the upcoming Dispute Resolution Hearing, with the objective of bringing these proceedings to a conclusion.

The arguments

14. The mother's case, as it has been ably presented by Mr Fox, is that the costs order should be rescinded (or 'revoked') in its entirety. In the alternative the mother seeks an order that the costs order be varied by reducing the sum awarded to the father. In the further alternative, the mother seeks an order preventing the father from enforcing the order for costs without permission of the court, together with a direction that interest shall not be payable on the amount awarded to the father.

15. The mother maintains that she does not seek to re-litigate the costs issues *per se*, but wishes this court to revisit and alter the order "in the light of changed factors"[2]. The mother's case can, I believe, be fairly distilled to the following three points:

    i) She is financially unable to satisfy the costs order, given her modest income and means, and having regard to the costs which she has incurred over these lengthy proceedings. She complains that Francis J "never requested a Form E from the mother at the time of the costs judgment", and is now having to prioritise the costs of therapy for D;

    ii) The cost of living has risen significantly since the costs order was made which has had an adverse impact on her and her family; this was not foreseen at the time of the order;

    iii) The most significant change in circumstances "is not financial; D's welfare is inextricably linked to this outcome … [t]he costs award and enforcement of the same will have devastating consequences and dictate the direction for [D] moving forward in her life"[3]. Moreover, the mother is rendered anxious and stressed by the costs order; this is having an impact on her life and her care of D, and accordingly on D's wellbeing, and will continue to do so. "It cannot be in D's interests for anything to imperil the mother's and the maternal family's equilibrium prior to and during engagement in the therapy. The intolerable burden of the present costs order does precisely that… the mother must be in a position where she can engage freely with the therapeutic process without fear of the possibility that the costs will cause it to end prematurely, which of course would be to the detriment of the most important person in this process, D."[4].

16. The father opposes the application, referring to it as "an appeal by the backdoor"[5]. The father's case is that the mother had made clear in her original submission to Francis J on the determination of the costs issue that she was financially destitute; when making

[2] Position Statement 17 Jan 2023.
[3] M 'Response Document' 6 Mar 2023
[4] Position Statement 17 Jan 2023
[5] Position Statement 23 Feb 2023

the order for costs, Francis J was well aware of this. The father maintains that the mother's financial circumstances have not materially changed since that order so as to justify its variation or revocation. The cost of living crisis has not fallen on the mother alone; the father is also similarly affected, and he will of course be affected by any variation or revocation of the earlier order.

17. He further maintains that the application is premature; the order does not fall due until January 2024, and there is no evidence at this stage as to what the mother's financial circumstances will be then.

Questions for determination

18. These arguments give rise to the following questions:

    i) Should the mother have appealed Francis J's order? Is the mother's current application effectively an appeal against that order?

    ii) Is the mother entitled to seek variation/revocation under Rule 4.1(6) FPR 2010?

    iii) Should this application for variation or revocation have been remitted to Francis J?

    iv) What test should be applied on an application under rule 4.1(6) FPR 2010?

    v) Does power exist for the court to suspend enforcement of the costs order?

Before turning to the questions posed above, and my conclusions (from §45-50) it is important to consider the costs judgment (unreported) itself.

The costs judgment

19. The following passages from the costs judgment are of note:

    i) "The Guardian played a significant part in the proceedings and, again exceptionally, supported the father in his appeal, although not from the outset. … the support for the appeal out of time that latterly came from the Guardian should have been a clear warning sign to the mother that her case was far from an easy one" (§2); … "… given the support for the father's appeal from experienced leading counsel on behalf of the Guardian, it must have struck the mother and those advising her that there was substantial merit in the appeal" (§20);

    ii) "I have referred above to the human tragedy in this case. There is also a financial calamity which follows on as a consequence of the endless proceedings before the Family Court. Neither party is of significant means, although neither was able to qualify for Legal Aid" (§7);

    iii) "[T]he mother is right to assert that it was her right to challenge the appeal, at least in its early stages" (§11);

iv) "I fully accept that this is a family in crisis and that these parents will have to work extraordinarily hard, **together**, if they are to take matters forward in [D]'s best interests" (§27) (emphasis by bold in the original);

v) "Further, the mother says, and I accept, that: 'depriving me of £161,625.65 would leave me in financial destitute (sic.) and would have lasting and significantly detrimental results upon [D] and her life options along with her sister'." (§28);

vi) "The mother tells me, and I accept, that she and her husband no longer have any savings, that they now have outstanding loans to both of their parents and are "over leveraged against our home". However, at the end of the day, this is not simply an application based on financial resources. My starting point was that neither of these parents could afford the fees that they have incurred. My finishing point is that the father incurred the fees that he did because he had been wronged and he was required to prove it. There were steps that the mother could have taken to reduce the costs. Once I had given permission to appeal, the mother could have accepted that the earlier hearing was flawed, but instead she went to the Court of Appeal and tried to overturn my decision. She then put the family through a long and agonising further fact-finding hearing before Cobb J. She contested the appeal in the face of powerful submissions by the Guardian. She instructed her counsel to take every minute point in front of me in relation to the appeal and the application for relief from sanctions, in spite of the fact that I repeatedly suggested that the detailed facts were not the issue at the appeal hearing" (§29);

vii) "These parents may not have been rich but they were by no means poor until these proceedings took their toll" (§31);

viii) "I recognise that neither the mother nor the father can bear the burden of the costs that they have incurred" (§33).

Should the mother have appealed the costs order?

20. There is no clear signboard available to a litigant, particularly a litigant-in-person as the mother was in this case at a crucial time, to point to the most appropriate process under which to challenge an order (including an order for costs made at the conclusion of an appeal, or otherwise) in the High Court. The options would appear be: (a) by an appeal against that order; (b) by an application to a judge at first instance to vary or revoke the order; or potentially (c) by a fresh action (though in civil proceedings this would usually only be relevant to challenge a final order obtained by fraud; in CA 1989 welfare-oriented proceedings, there may be a case for a fresh application under section 8 CA 1989[6], but a costs order is not a welfare decision). Seventeen years ago[7], Munby J described this procedural terrain as a "quagmire". The ground has firmed up only a little since that time, given (i) amendments to the 1984 Act for orders made in the Family Court, (ii) the introduction of rule 4.1(6) into the FPR 2010, and (iii) following *Gohil v Gohil* [2015] UKSC 61 at [18](c) and *Sharland v Sharland* [2015] UKSC 60 at [42], the creation of a new rule 9.9A FPR 2010 which formalises the procedure for

[6] *section 8(2)* and *section 10(4)/(6)/(8) CA 1989*, and see also [39] of
[7] *L v L* [2006] EWHC 956 (Fam) at [39]

setting aside financial remedy orders[8]. The terrain (in respect of High Court orders at least) is still somewhat soft underfoot.

21. I take as my starting point section 17 of the Senior Courts Act 1981 ('SCA 1981'); this provides as follows:

> 17.— Applications for new trial.
>
> "(1) Where any cause or matter, or any issue in any cause or matter, has been tried in the High Court, any application for a new trial thereof, or to set aside a verdict, finding or judgment therein, shall be heard and determined by the Court of Appeal except where rules of court made in pursuance of subsection (2) provide otherwise.
>
> (2) As regards cases where the trial was by a judge alone and no error of the court at the trial is alleged, or any prescribed class of such cases, rules of court may provide that any such application as is mentioned in subsection (1) shall be heard and determined by the High Court".

22. Where a party alleges that a decision of the court is wrong, or unjust because of a serious procedural or other irregularity, then the proper course would be to seek permission to appeal[9] that decision; if successful on one or other argument, the appeal will be allowed: rule 52.21(3) Civil Procedure Rules 1998 ('CPR'). Permission will only be granted where (a) the court considers that the appeal would have a real prospect of success; or (b) there is some other compelling reason for the appeal to be heard (rule 52.6 CPR).

23. In this case, the mother has argued that the costs order was made without proper regard to her financial situation, and was unfair in penalising her for opposing an appeal when, for an extended period during the litigation, the Children's Guardian had taken a similar position.

24. Not uncommonly, as here, a party wishes to allege (in addition to other arguments) that the decision of the court is wrong in light of new evidence which has emerged since the judgment/order, and casts doubt upon it. Fresh evidence post-proceedings may arise in any number of different contexts; in *Re E* [2019] EWCA Civ 1447, Peter Jackson LJ discussed the limited circumstances in which the appeal court will receive evidence which has not been before the lower court, given the terms of CPR 51.21(2)[10]. In considering whether to receive fresh evidence, the appeal court seeks to give effect to the overriding objective of doing justice; the decision of *Ladd v Marshall* [1954] 1 WLR 1489 remains powerful persuasive authority ([20]) in this respect.

25. In *Re E*, the Court of Appeal focused on the statutory regime of section 31F(6) of the 1984 Act and its application where fresh evidence undermines, or may undermine,

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[8] FPR 2010, r 9.9A was made under s 17(2) of the Senior Courts Act 1981

[9] Except in a few limited circumstances, not relevant here.

[10] Unless it orders otherwise, the appeal court will not receive evidence which was not before the lower court: CPR 51.21(2).

factual findings. This is not, strictly speaking, the situation here, but the judgment of Peter Jackson LJ is nonetheless of interest and significance. At [45] he said this:

> "… the family court has the statutory power to review its own decisions and that challenges to findings of fact on the basis of further evidence do not have to be by way of appeal only. … other things being equal, an application to the trial court is likely to be a more suitable course than an appeal. The trial court is likely to be in a better position than this court to assess the true significance of the further evidence, its advantage being all the greater if the findings are relatively recent, and if the matter can be considered by the judge who made them, as should always be the case if possible. Another reason for preferring an application to an appeal is that it is likely to be dealt with more quickly and at less expense. There will, however, be circumstances in which a return to the trial court will not be appropriate. That will certainly be the case where the applicant is alleging an error by the trial judge, regardless of the further evidence. Judges cannot hear appeals from themselves."

26. It is noted that at [43] Peter Jackson LJ addressed, but expressed no view about, the specific application of rule 4.1(6) FPR 2010 in circumstances where fresh evidence has emerged after the hearing at first instance; on the facts of that appeal, he said, it was:

> "… unnecessary to consider the reach of the provisions contained in FPR r.4.1(6) and CPR r.3.1(7) which provide that "a power of the court under these Rules to make an order includes a power to vary or revoke the order", or the range of authorities before and since *Tibbles v SIG (Trading as Asphaltic Roof Supplies)* [2012] EWCA Civ 518 in which those rules have been considered, though I note that in *N v J (Power to Set Aside Return Order)* [2017] EWHC 2752 (Fam), MacDonald J, while dismissing an application to set aside a High Court wardship order, held that FPR r. 4.1(6) provided a basis for the application to have been made".

At [53] in *Re E* (ibid.), Peter Jackson LJ observed that the High Court does not "benefit" (his word) from the provisions of section 31F(6) of the 1984 Act; he added that:

> "It would clearly be preferable if procedure in the High Court was equivalent to that in the Family Court, indeed it is perverse that it is not".

Having referenced the incorporation of rule 9.9A (following the Supreme Court's decisions in *Sharland* and *Gohil*, see above) he said at [54]:

> "The course of this appeal demonstrates the value of an equivalent rule encompassing applications to set aside or vary orders and findings of fact in children cases. This is a

> matter that the Family Procedure Rules Committee may wish to consider".

Is the mother entitled to seek variation/revocation under Rule 4.1(6) FPR 2010?

27. Although no relevant rules (for present purposes) have been made pursuant to section 17 SCA 1981, the Family Procedure Rules 2010 ('FPR 2010') includes rule 4.1(6) FPR 2010, which provides that:

> "A power of the court under these rules to make an order includes a power to vary or revoke the order."

This rule is in exactly the same terms as rule 3.1(7) of the CPR.

28. The question which arises here, as it has in other cases, is whether rule 4.1(6) can be used to vary or revoke a final order. Notably, under r.3.1(7) of the CPR, the courts have held that the "order" which can be varied or revoked does not exclude a final order. In *Lloyds Investment (Scandinavia) Ltd v. Ager-Hanssen* [2003] EWHC 1740 (Ch), Patten J (as he then was) said:

> "It seems to me that the only power available to me on this application is that contained in CPR Part 3.1(7), which enables the Court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him." (emphasis added).

29. Mostyn J in *TF v PJ; Re F (A Child) (Return Order: Power to Revoke)* [2014] EWHC 1780 (Fam) ('*TF v PJ*') referenced the CPR and relied – for his ultimate conclusion that rule 4.1(6) FPR 2010 also gave power to rescind or vary a final order in family proceedings – on a number of civil judgments including the decision in *Roult v North-West Strategic Health Authority* [2009] EWCA Civ 444. In that case, Hughes LJ (as he then was) had indicated (at [15]), like Patten J before him (see §28 above), that "in its terms the rule is not expressly confined to procedural orders". Mostyn J also referenced, and drew support from, the Supreme Court's judgment in *Re L and B* (Children) [2013] UKSC 8, and Lady Hale's comments in particular at [38] where she referenced rule 4.1(6) FPR 2010 and said:

> "… that power does not enable a free-for-all in which previous orders may be revisited at will. It must be exercised "judicially and not capriciously". It must be exercised in accordance with the over-riding objective. In family proceedings, the overriding objective is "enabling the court to deal with cases justly, having regard to any welfare issues

> involved": Rule 1.1(1) of the Family Procedure Rules. It would, for the reasons indicated earlier, be inconsistent with that objective if the court could not revisit factual findings in the light of later developments." (emphasis added).

These dicta encouraged Mostyn J in *Re F* to conclude, at [20] and [23]:

> "[20]… the power [to vary or revoke] is not confined only to procedural or case management orders made under the rules. It applies whether in the civil sphere or in the family sphere and, within the family sphere, whether in children proceedings or financial remedy proceedings it applies to final orders. …
>
> [23] It is important that the court should recognise that there should be consistency in the application of identical words to situations across the board and, in my judgment, the provisions of rule 4.1(6) empower this court, provided that either non-disclosure or a significant change of circumstances is demonstrated, to make an order revoking the original order …".

30. It should further be noted in this context that in *Sharland v Sharland* [2015] UKSC 60 at [41] Lady Hale had accepted that rule 4.1(6) FPR 2010:

> "… does give the family court power to entertain an application to set aside a final order in financial remedy proceedings on the well-established principles with which we are concerned in this case".

31. In *N v J (Power to Set Aside Return Order)* [2017] EWHC 2752 (Fam) MacDonald J doubted that rule 4.1(6) FPR 2010 could be used to vary or revoke a final order. He drew from a number of sources, citing more extensively from Hughes LJ's judgment in *Roult*:

> [15] "There may possibly be examples of non-procedural but continuing orders which may call for revocation or variation as they continue – an interlocutory injunction may be one. But it does not follow that wherever one or other of the two assertions mentioned (erroneous information and subsequent event) can be made, then any party can return to the trial judge and ask him to re-open any decision. In particular, it does not follow, I have no doubt, where the judge's order is a final one disposing of the case, whether in whole or in part… The interests of justice, and of litigants generally, require that a final order remains such unless proper grounds for appeal exist."

32. MacDonald J also cited the judgment of Black LJ in *Re F (Children: Setting Aside Return Orders)* [2016] EWCA Civ 1253 in which she said (at [27]) that having considered Mostyn J's judgment in *TF v PJ*:

> "I would be reluctant to make definitive pronouncements upon the subject of the existence, and, if it exists, the nature, of the High Court's power to set aside 1980 Hague Convention return orders…. However, although I am not prepared to hazard a view as to whether the power actually does exist, I do acknowledge that *TF v PJ* and the instant case show that it is plainly desirable that there should be such a power in the High Court, albeit that it can be anticipated that it would rarely be used".

33. MacDonald J cited Moylan LJ in *Wilmot v Maughan* [2017] EWCA Civ 1668 at [85]:

> "… section 17 [SCA 1981] deals with applications after any cause or matter or any issue has been tried. This can be contrasted with FPR r. 4.1(6) (and the equivalent CPR r. 3.1(7)) which gives the court power to vary or revoke orders made pursuant to a power "under these rules"".

34. In declining to align himself with Mostyn J in *TF v PJ*, MacDonald J, at [74](i), said this:

> "… a return order made under the inherent jurisdiction is properly characterised as injunctive and interlocutory in character, in that it seeks to compel a parent to return the child to the jurisdiction of his or her habitual residence pending final trial of the substantive welfare issues before the court. In such circumstances, in my judgment it is doubtful whether it can be said that such an order follows a trial of a cause or matter or an issue in a cause or matter for the purposes of s 17(1) of the Senior Courts Act 1981".

35. Neither counsel addressed these issues before me at any length (or at all), and the hearing had proceeded on the basis that rule 4.1(6) FPR 2010 did indeed provide a route to a potential remedy for the mother. However, it is important that the parties recognise the somewhat contentious jurisdictional platform on which the mother's claim was in fact positioned. I return to this at §48 and §49 below.

Should the application for variation or discharge have been remitted to Francis J?

36. Had the sole issue before the court been an alleged change in the mother's financial situation, which had led to her inability to pay the costs order, I would have had no hesitation in transferring the application back to Francis J. As I said, in a similar context, in *A and B v F and M* [2021] EWFC 76 "[i]t would ordinarily be desirable for any application for rescission or variation under *section 31F(6)* to be re-listed before the judge who made the original order". Peter Jackson LJ in *Re E* at [45]) made a similar point – that it is far better for an application for variation or discharge to be heard by the judge who made the original order.

37. However, the mother emphasised in her application (and at the case management hearing in this application) that her primary case is that the costs order is having a deleterious effect on her, and that this is having (or is likely to have) an adverse impact

on the welfare of D (see §15(iii) above). For this reason, as I am seised of the welfare issues, I resolved, with the agreement of the parties, to determine the application myself.

What test should be applied on an application under rule 4.1(6) FPR 2010?

38. I have had regard to a number of authorities in this regard, including but not limited to *N v J* (citation above) at [69]-[78], and *Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)* [2012] 1 WLR 2591 ('*Tibbles*'). I have also re-visited my own decision in *A and B v F and M* [2021] EWFC 76, a case brought under section 31F(6) of the Matrimonial and Family Proceedings Act 1984 ("the 1984 Act") at [25]-[39] and in particular what I said at [39].

39. In light of these authorities, I apply the following principles to this application:

    i) The welfare of D is relevant but not the paramount consideration on this application;

    ii) Although the court has a reasonably broad discretion to vary or revoke an order, that discretion is likely to be exercised only where:

        a) there has been fraud;

        b) there has been a material change of circumstances since the order was made;

        c) the facts on which the original decision was made have been misstated (innocently or otherwise); this would include a situation where there has been material non-disclosure;

        and/or

        d) there had been a manifest mistake on the part of the judge in formulating the order.

    iii) In exercising that discretion, a court should, in my judgment, have clear regard to the following principles:

        a) The court's power under section 31F(6) of the 1984 Act (and I suggest, by analogy, rule 4.1(6) FPR 2010) is not "unbounded": per Baroness Hale in *Sharland v Sharland* [2015] UKSC 60 at [41]; it should be subject to "principled curtailment" (per Rix LJ at [39](i) in *Tibbles*);

        b) The discretion should be exercised judicially and not capriciously; it must be exercised in accordance with the overriding objective (rule 1 FPR 2010), that is to say, "enabling the court to deal with cases justly, having regard to any welfare issues involved";

        c) It is undesirable to allow litigants two bites at the cherry; I should be wary not to allow a litigant to re-litigate afresh a matter which has already been decided;

d) This avenue should not be used to undermine or subvert the proper route of appeal,

e) Discretion is likely to be more sparingly exercised in relation to a final order as opposed to a procedural, interlocutory, injunctive or case management order.

Variation and Enforcement

40. During the hearing, I asked counsel to consider whether it would be open to me to conclude that the costs order should remain in place as directed by Francis J, but should be subject to a direction that it could not be enforced by the father without him obtaining my prior leave. As neither counsel had considered this in any detail, I directed further written submissions.

41. Ms Briggs on behalf of the father submitted that I had no power to make such an order in CA 1989 proceedings where the party against whom the costs order is made (i.e., the mother here) is not legally aided; she argued that such an order would be "entirely novel". Alternatively, she submitted that such an order would place an unfair onus on (and cost to) the father to return the matter to court in circumstances in which he would be essentially 'blind' to whether the mother's circumstances had sufficiently changed to justify the lifting of the suspension of his right to enforce. He does not know where the mother lives, nor where D goes to school; indeed, he knows virtually nothing about the mother's current circumstances.

42. Mr Fox argued the contrary position, and reminded me that I had in fact made such an order in *Re E-R (Child Arrangements Order No.2: Costs)* [2017] EWHC 2535 (Fam), without subsequent challenge. In that case, I was concerned to ensure that a father did not use the financial obligation to honour a costs order as an excuse for him not to comply with a child arrangements order which I had made, which would have incurred a cost to him. I therefore directed that the costs order would not be enforceable without my permission.

43. The classic illustration of the principle flagged at §40 above is to be found in *Wraith v Wraith* 1997 1 WLR 1540, where the Court of Appeal considered the provision that a costs order 'not … be enforced without leave', where the unsuccessful party was in receipt of legal aid. Butler Sloss LJ, giving the judgment of the Court, said this at p.1545:

> "The court in accordance with the normal practice, and as provided by section 31 [Legal Aid Act 1988], decides in each case whether a party ought in principle to pay the costs of that case regardless of whether either party is a legally assisted person. If it decides that there ought to be an order for costs against the legally assisted party, the court is then obliged under section 17(1) to consider the amount which it would be reasonable for him to pay having regard to all the circumstances, including the financial resources of all the parties and their conduct in connection with the dispute".

She added (p.1545):

> "The order was originally termed a "football pool" order, a phrase still in general use but the origins of which are somewhat obscure. Its first reported use appears to have been in *Rogan v. Kinnear Moodie & Co. Ltd. [1955] 1 Lloyd's Rep. 442* , when Pearson J. made a nominal order for costs against the plaintiff and said, at p. 448: "What one wants is that in case Mr. Rogan suddenly becomes rich, wins a football pool or whatever it may be, then the defendants can apply." Twenty years on, in *Ellis v. Scruttons Maltby Ltd. [1975] 1 Lloyd's Rep. 564* , Croom-Johnson J., who had been counsel in *Rogan's* case, was asked by counsel to make the "usual football pool order. …
>
> … in the case of the unsuccessful legally aided litigant coming into possession of substantial assets, or otherwise being in a position readily to pay costs previously awarded to the other party, there seems no reason of principle or common sense why he should be treated differently from a formerly impecunious litigant who wins a football pool. If he pulls off a business coup, obtains highly paid employment or inherits a small fortune it is likely to be equally appropriate that he meet a costs order previously outside, but now well within, his means".

44. I, for my part, see no reason why this kind of order (an order for payment of a sum 'not to be enforced without leave') cannot be made in cases where the unsuccessful party is not legally aided but is nonetheless impecunious, although I recognise that the circumstances in which such an order in family proceedings may be made are likely to be rare. Rule 4.1(4)(a) FPR 2010 allows the court to make any order "subject to conditions", and this gives me, in my judgment, all the authority I need.

Conclusion

45. The mother appears initially to have accepted that Francis J was entitled, in principle at least, to make the costs order against her; she explicitly acknowledged in her 25 November 2021 response to the judgment (see §5 above) that he was "ultimately entitled to find that I should be required to pay a sum of money towards the Father's costs". However, she challenged aspects of his conclusion and reasoning, namely that:

    i) The basis of the computation of the award against her was unfair or 'wrong'; she questioned why she could/should be regarded as liable for the father's costs during the period in which the Children's Guardian was also opposing the father's appeal;

    and

    ii) The judge was wrong to make an order which had / has left her (as she has described, though I make no finding in this regard) on the brink of bankruptcy.

46. In the arguments presented to me on this application, she has also suggested that the approach of Francis J was procedurally irregular. Mr Fox argued by the mother that:

> "[t]he costs order was made in the *absence* of either the mother or father evidencing their financial assets and liabilities to the Court. The Court did not request such information prior to directing the costs award… Mr Justice Francis did not consider the mother's financial circumstances to ascertain whether she had any borrowing capacity or any other means to meet the costs order he went onto make… If the mother had been directed by the Court to support her position as being dire with a financial assessment at the time, then potentially this award may not have been handed down".

For this reason, the mother argues, Francis J did not have a proper understanding of her finances before reaching his conclusion and making the order under consideration.

47. I am sure that the mother's dissatisfaction with the costs order has grown over the last 12 months, as her finances have become tighter, and the stresses of her family situation have become more acute. But given the mother's deep dissatisfaction with the original order, it seems to me that she could or should have challenged it at the time by way of an application for permission to appeal, rather than – as she has done – by seeking its variation or revocation a year later. The mother should not interpret these comments as encouraging of any appeal; far from it. Consideration of the merits of an appeal (particularly one which would be now so far out of time) has for obvious reasons not been argued before me and is not within the scope of this judgment. In this regard it is worth noting that:

i) The Judge required the mother to pay only one-half of the father's costs in an environment where costs often follow the event; in this sense, his judgment may well reflect a discount of the award to reflect some of the arguments (both as to merits and ability to pay) set out above,

and

ii) It is obvious that Francis J was aware of the "financial calamity" which had fallen on both parties by this litigation; he was plainly aware of the mother's argument that an order for costs may make her financially "destitute" (see §19 (ii) and (v) above). He plainly had close regard to the parties' financial situations, but he rightly recorded that "this is not simply an application based on financial resources" (see the quote at §19(vi) above).

48. So, I turn to the current application. For the reasons set out above, it is my view that rule 4.1(6) FPR 2010 can indeed provide the mother with a route to a remedy; I am prepared to accept that rule 4.1(6) FPR 2010 does give the court the power to vary or revoke a final order. I regard it as entirely proper to draw on the caselaw which has considered rule 3.1(7) CPR, where judges have reached that specific conclusion, although I accept that the circumstances in which the power can be used in relation to a final order is likely to be limited; a discrete, self-contained order such as a costs order is one good example. In this regard, and not without some hesitation, I accept the views and reasoning of Mostyn J in *TF v PJ* in preference for the more circumspect approach taken by MacDonald J in *N v J*.

49. Although I find that I have jurisdiction under rule 4.1(6) FPR 2010 to vary or revoke the order, I am not, however, satisfied that the mother has established a proper basis to enable me to do so. In short, she has not demonstrated in my judgment a sufficient change in circumstances since the order was made (or other basis identified in §39 above) which would enable me, in the exercise of my discretion, to revoke or vary the costs order. I say so for the following reasons:

    i) *Financial inability to pay*: Although when Francis J considered the arguments on the costs issue he did not apparently have detailed financial statements or disclosure from the parties, I am satisfied nonetheless that he was well aware of the state of the parents' respective finances in at least general terms. For instance, (as I have mentioned above – see §47(ii)) he referred to the "financial calamity" which had befallen the parties as a result of the proceedings (see §19(ii) above), and the fact that neither the mother nor the father could "bear the burden of the costs… incurred" (see §19(viii) above); he further referred to the relative poverty of both parents (§19(vi) above)). Specifically, Francis J addressed the fact that neither the mother nor her husband "have any savings, that they now have outstanding loans to both of their parents and are "over leveraged against our home"" (§19(v) and that "neither of these parents could afford the fees that they have incurred" (ibid.). It seems clear to me that Francis J was well aware that the mother was financially in an extremely vulnerable position, and he did not identify means by which she would be able to satisfy the costs order. While the mother's financial situation may have deteriorated over the last 15 months, I cannot find that this constitutes a change in circumstance which is materially different from the position which she presented to Francis J. The mother has had to commit in part at least to the cost of the therapy, but this is £650-700 so far and is not so significant a sum as to warrant a conclusion that there has been a material change in circumstances;

    ii) *Cost of living changes*: It is well understood that the cost of living has risen in the last 12 months; it is a matter of record that the Consumer Prices Index including owner occupiers' housing costs (which is relevant here) rose by 8.9% in the 12 months to March 2023. However, I am not satisfied that the rise in the cost of living between the date of the order and the date of the mother's application constitutes a material change in circumstances; insofar as it is a change, it of course affects *both* parties who are now relatively worse-off;

    iii) *Impact on welfare of D*: I accept that the mother is stressed by the ongoing proceedings and in particular at present by the therapy. However, this is not in itself a material change. In March 2021 I found that the mother had experienced "life stresses" for a considerable period of time, including during the period in which D was making her allegations, and was continuing to do so. Francis J was aware that I found the mother to be a "temperamental" and "emotional" woman. I accept that the costs order may well have aggravated the mother's stresses, however I do not accept that the imposition of the costs order has so materially increased those stresses that:

        a) This of itself is having an adverse impact on D;

        b) That even if it was, that this was not foreseen by Francis J at the time he made the costs order;

c) This is in itself a sufficient reason for revoking or varying the order.

Moreover, the father's recent concession that he will not seek direct contact with his daughter may serve to alleviate some of the pressure on this mother over the months and years ahead.

50. Having found that no basis exists for a variation or revocation of the costs order on this application, it would evidently not be principled for me to "vary" it by suspending enforcement of it. This was Mr Fox's very much subsidiary argument, and I decline to make such an order. As it happens, the question of enforcement does not in fact arise for another 8 months. Whether the father seeks enforcement of the order at that time is a matter for him. He will by then be entitled to receive from the mother a very substantial sum of money to assist him to defray his own enormous bill of costs in pursuing his appeal. I am conscious that he has lost financially to a significant degree through this litigation. More importantly, and very sadly, he has to all intents and purposes lost a relationship with his daughter. But if he considers that enforcement of this order will indeed have "devastating consequences" for the mother and her family, including D, I imagine that he may well find himself pausing before doing so.

51. That is my judgment.